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UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

No. 98-7166
Filed March 1, 1999
Issued as Mandate March 22, 1999

SUMMARY ORDER

THIS SUMMARY ORDER WILL NOT BE PUBLISHED IN THE FEDERAL REPORTER AND MAY NOT BE CITED AS PRECEDENTIAL AUTHORITY TO THIS OR ANY OTHER COURT, BUT MAY BE CALLED TO THE ATTENTION OF THIS OR ANY OTHER COURT IN A SUBSEQUENT STAGE OF THIS CASE, IN A RELATED CASE, OR IN ANY CASE FOR PURPOSES OF COLLATERAL ESTOPPEL OR RES JUDICATA.

At a stated Term of the United States Court of Appeals for the Second Circuit, held at the United States Courthouse, Foley Square, in the City of New York, on the first day of March, one thousand nine hundred and ninety-nine.

Present: HONORABLE ELLSWORTH A. VAN GRAAFEILAND,
HONORABLE AMALYA L. KEARSE,
HONORABLE FRED I. PARKER,
Circuit Judges.

RICHARD HALL LIGHTFOOT,

Plaintiff-Appellant,

—v.—

UNION CARBIDE CORP., A.W. LUTZ, President, Industrial Chemicals Division, W.E. SHACKELFORD, Vice President, Industrial Chemicals Division,

Defendants-Appellees.

Appearing for Appellant: Arthur M. Wisehart, Wisehart & Koch, N.Y., N.Y.

Appearing for Appellees: Joel E. Cohen, McDermott, Will & Emery, N.Y., N.Y.

Appeal from the United States District Court for the Southern District of New York.

This cause came on to be heard on record from the United States District Court for the Southern Circuit of New York, and was argued by counsel.

ON CONSIDERATION WHEREOF, it is now hereby ordered, adjudged, and decreed that the judgment of said District Court be and it hereby is affirmed.

Plaintiff Richard Hall Lightfoot appeals from a judgment of the United States District Court for the Southern District of New York, Harold Baer, Jr., *Judge*, awarding him $20,000 in compensatory damages against defendants Union Carbide Corporation ("Union Carbide") *et al.*, following a jury verdict in that amount on the retrial, following a prior appeal to this Court, *see Lightfoot v. Union Carbide Corp.*, 110 F.3d 898 (2d Cir. 1997) ("*Lightfoot I*"), of the damages issues on his state-

law claim of age discrimination. On appeal, Lightfoot contends principally that the district court impermissibly ordered a conditional remittitur to $75,000 of the first jury's verdict of $750,000. He also contends that he should have been permitted to amend his complaint following the remand in *Lightfoot I* in order to reinstate a previously dismissed claim and to add a new claim; that the court erroneously excluded certain evidence at the retrial; and that the district judge should have recused himself. Finding no merit in Lightfoot's contentions, we affirm.

Lightfoot's principal contention need not detain us long, for it was rejected in *Lightfoot I*, and we "will not overrule a prior decision of a panel of this Court absent a change in the law by higher authority or by way of an in banc proceeding of this Court," *Samuels v. Mann*, 13 F.3d 522, 526 (2d Cir. 1993), *cert. denied*, 513 U.S. 849 (1994); *see also In re Mediators, Inc.*, 105 F.3d 822, 828 (2d Cir. 1997); *United States v. Coffin*, 76 F.3d 494, 496 n.1 (2d Cir.), *cert. denied*, 517 U.S. 1147 (1996). A prior panel's ruling on an issue that was briefed, argued, and addressed by the parties creates a binding precedent constraining future panels. *See, e.g., Getty Petroleum Corp. v. Bartco Petroleum Corp.*, 858 F.2d 103, 113 (2d Cir. 1988), *cert. denied*, 490 U.S. 1006 (1989); *Korwek v. Hunt*, 827 F.2d 874, 877 (2d Cir. 1987).

In *Lightfoot I*, Lightfoot challenged the district court's remittitur order, contending, *inter alia*, that the court's reduction of the verdict constituted error as a matter of law, that it violated his right to a jury trial, that the size of the verdict was supported by the evidence, and that the district court erred by not offering him the option of a new trial as an alternative to remittitur. He argued that the district court's order "reducing the damages awarded by the jury should be vacated and the damage award of the jury reinstated." (Lightfoot brief on appeal in *Lightfoot I*, dated March 1, 1996, at 48.) We considered all of Lightfoot's contentions, and we found merit only in the contention that "the district court erred in granting defendants' motion for a remittitur without offering Light-

foot the option of a new trial on damages," *Lightfoot I*, 110 F.3d at 915, and we remanded "to allow Lightfoot the opportunity to exercise this option," *id.* We did not find any other error, and we did not grant Lightfoot's request for reinstatement of the judgment. To the extent that Lightfoot makes arguments on the present appeal that he made to the *Lightfoot I* panel, they have been rejected and we see no reason to revisit them. To the extent that Lightfoot suggests that any of his present challenges to the pre-*Lightfoot I* remittitur order were not made on his prior appeal, those challenges have been waived. *See, e.g., County of Suffolk v. Stone & Webster Engineering Corp.*, 106 F.3d 1112, 1117 (2d Cir. 1997) (a decision made at a previous stage of litigation, which could have been challenged in the ensuing appeal but was not, becomes the law of the case); *Fogel v. Chestnutt*, 668 F.2d 100, 109 (2d Cir. 1981) ("It would be absurd that a party who has chosen not to argue a point on a first appeal should stand better as regards the law of the case than one who had argued and lost."), *cert. denied*, 459 U.S. 828 (1982).

Lightfoot's other contentions with respect to pre-*Lightfoot I* rulings of the district court are similarly rejected for the above reasons.

We also find no merit in the contention that the district court, following the remand in *Lightfoot I*, should have allowed Lightfoot to amend his complaint to reinstate a previously dismissed claim under the New York City Human Rights Law or to plead a new claim for retaliation. The liability phase of the case had ended, and *Lightfoot I* remanded for a partial new trial—if plaintiff chose that option over the remittitur that would have ended the entire case—solely on the issue of damages. The denial of Lightfoot's motion to add additional claims was well within the district court's discretion.

Nor is there merit in Lightfoot's evidentiary challenges. The trial court "has wide discretion in controlling the admissibility of testimony and other evidence, and absent a demonstration of abuse of discretion, its rulings will not be

disturbed." *Zahra v. Town of Southold*, 48 F.3d 674, 686 (2d Cir. 1995); *see also Healey v. Chelsea Resources, Ltd.*, 947 F.2d 611, 619-20 (2d Cir. 1991). "The same standard of review applies to a district court's evidentiary rulings on expert testimony." *Raskin v. Wyatt Co.*, 125 F.3d 55, 66 (2d Cir. 1997). The trial court acts as a gatekeeper with respect to expert testimony, properly admitting only such testimony as would help the jury understand the evidence or determine a fact at issue. *See Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579, 591-93 (1993); *Raskin v. Wyatt Co.*, 125 F.3d at 66 & n.5; *McCullock v. H.B. Fuller Co.*, 61 F.3d 1038, 1042-43 (2d Cir. 1995). Thus, the court must "ensur[e] that an expert's testimony both rests on a reliable foundation and is relevant to the task at hand." *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. at 597. Where the record indicates that the expert failed to consider necessary factors or that his analysis rests on faulty assumptions, the trial court has discretion to exclude his proffered testimony for lack of probative value. *See, e.g., Raskin v. Wyatt Co.*, 125 F.3d at 67-68.

We see no abuse of discretion in the trial court's evidentiary rulings at Lightfoot's retrial of the damages issues. Lightfoot argues, *inter alia*, that the court could not properly exclude the expert testimony of Dr. Cellura because Cellura was allowed to testify at the first trial. We are unpersuaded for several reasons. At the first trial Cellura testified as a lay witness; this did not mean that he must be allowed to testify at the retrial as an expert. Further, even had he testified as an expert at the first trial, his testimony would not necessarily have been relevant at the retrial, for the first trial encompassed issues of both damages and liability, whereas the retrial was limited to damages. Finally, Lightfoot sought to have Cellura testify to "the level of compensation that [Lightfoot] should have received at Union Carbide . . . before his termination became tainted by age discrimination" (Lightfoot brief on the present appeal, dated May 13, 1998, at 25). That testimony was properly excluded, as it would have been relevant only to Lightfoot's claim that he was denied salary

increases at Union Carbide, a claim previously rejected by both the district court and this Court in *Lightfoot I*, 110 F.3d at 906-08.

It was also well within the trial court's discretion to exclude the proffered testimony of an accountant as to the difference between the salary Lightfoot would have received at Union Carbide, had he not been terminated, and what he subsequently earned as a consultant. Such a calculation is essentially one of front pay, to which Lightfoot was not entitled. The proffered evidence did not bear on the type of damages he was entitled to recover. Further, the accountant's testimony was based on the flawed assumption that Lightfoot had been improperly denied salary upgrades while still employed by Union Carbide—a basis for recovery that, as discussed above, had been rejected.

Finally, Lightfoot's claim that the district judge should have recused himself is meritless. Though a judge must "disqualify himself in any proceeding in which his impartiality might reasonably be questioned," 28 U.S.C. § 455(a), Lightfoot presented no basis for disqualification here. The adverse rulings of law and attempts to encourage settlement provided no reasonable basis for questioning the judge's impartiality. We see no abuse of discretion, *see, e.g., Diamondstone v. Macaluso*, 148 F.3d 113, 120 (2d Cir. 1998); *United States v. Conte*, 99 F.3d 60, 65 (2d Cir. 1996), in the denial of Lightfoot's recusal motion.

We have considered all of Lightfoot's contentions on this appeal and have found them to be without merit. The judgment of the district court is affirmed.

FOR THE COURT:

CAROLYN CLARK CAMPBELL, Clerk

by: /s/ LUCILLE CARR

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

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92 CIVIL 6411 (HB)
Filed January 20, 1998

RICHARD HALL LIGHTFOOT,

Plaintiff,

—against—

UNION CARBIDE CORPORATION; A.W. LUTZ; W.E. SHACKELFORD,

Defendants.

JUDGMENT

A Jury Trial before the Honorable Harold Baer, United States District Judge, having begun on January 5, 1998, and at the conclusion of the trial the jury having returned a verdict in favor of the plaintiff in the sum of $20,000.00 in compensatory damages, it is,

ORDERED, ADJUDGED AND DECREED: That the plaintiff have judgment in the sum of $20,000.00 in compensatory damages as against the defendants.

Dated: New York, New York
January 18, 1998

So Ordered:

/s/ HAROLD BAER, JR.
U.S.D.J.

JAMES M. PARKISON
Clerk of Court

BY: /s/ JOHN S. HAGEN
Deputy Clerk

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

Docket Nos: 95-9206, 95-9258
Filed March 27, 1997
Issued as Mandate April 17, 1997

At a Stated Term of the United States Court of Appeals for the Second Circuit, held at the United States Courthouse, Foley Square, in the City of New York, on the 27th day of March, one thousand nine hundred and ninety-seven.

Present: HON. AMALYA L. KEARSE
HON. JOSEPH M. MCLAUGHLIN
*Circuit Judges**

RICHARD HALL LIGHTFOOT,

Plaintiff-Appellant-Cross-Appellee,

—v.—

UNION CARBIDE CORP., A.W. LUTZ, President, Industrial Chemicals Division, W.E. SHACKELFORD, Vice President, Industrial Chemical Division,

Defendants-Appellees-Cross-Appellants.

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* The Honorable J. Daniel Mahoney, who was a member of the panel, died on October 23, 1996; the appeal is being decided by the remaining two members of the panel, who are in agreement, See 2d Cir. R. 0.14(b).

Appeals from United States District Court for the Southern District of New York.

This cause came on to be heard on the transcript of record from the Southern District of New York and was argued by counsel.

ON CONSIDERATION WHEREOF, it is now hereby ORDERED, ADJUDGED, and DECREED that the order of said district court be and it hereby is affirmed in part, vacated in part, and remanded to the said district court for further proceedings in accordance with the opinion of this court.

For the Court
GEORGE LANGE III, Clerk

by: /s/ BETH J. MEADOR
Beth J. Meador
Administrative Attorney

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

Nos. 1710, 1881—August Term, 1995

(Argued: June 16, 1996 Decided: March 27, 1997)

Docket Nos. 95-9206(L), 95-9258(XAP)

RICHARD HALL LIGHTFOOT,

Plaintiff-Appellant-Cross-Appellee,

—v.—

UNION CARBIDE CORP., A.W. LUTZ, President, Industrial Chemicals Division, W.E. SHACKELFORD, Vice President, Industrial Chemicals Division,

Defendants-Appellees-Cross-Appellants.

Before:

KEARSE and MCLAUGHLIN,

*Circuit Judges.**

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* The Honorable J. Daniel Mahoney, who was a member of the panel, died on October 23, 1996; the appeal is being decided by the remaining two members of the panel, who are in agreement. *See* 2d Cir. R. 0.14(b).

Plaintiff appeals from an order of the United States District Court for the Southern District of New York granting defendants' motion for partial summary judgment. Plaintiff also contends that the trial court erred in denying his claim for attorney's fees and in granting defendants' motion for a remittitur of the jury's award of damages. Defendants cross-appeal the court's denial of their motion for a new trial on the grounds that the jury's verdict was against the weight of the evidence and that various errors at trial rendered the proceedings fundamentally unfair to defendants.

AFFIRMED IN PART, VACATED IN PART AND REMANDED.

ARTHUR M. WISEHART, New York, New York (Wisehart & Koch, New York, New York, of counsel) *for Plaintiff-Appellant-Cross-Appellee*.

JOEL E. COHEN, New York, New York (Julie Y. Chen, Nancy I. Solomon, McDermott, Will & Emery, New York, New York, of counsel) *for Defendants-Appellees-Cross-Appellants*.

MCLAUGHLIN, *Circuit Judge*:

Plaintiff appeals from an order entered May 12, 1994 in the United States District Court for the Southern District of New York (Patterson, *J.*) granting summary judgment to defendants, dismissing all but one of plaintiff's

claims. Defendants cross-appeal, attacking the verdict as against the weight of the evidence and the entire trial as fundamentally unfair.

BACKGROUND

Plaintiff Richard Lightfoot was hired by defendant Union Carbide in 1959 as a chemical engineer in Carbide's Charleston, West Virginia facility. Over the following thirty-three years Lightfoot advanced fairly steadily in the company, taking on increasingly challenging job responsibilities with corresponding increases in his salary. In 1968 Lightfoot was transferred to Carbide's New York office, where he assumed a product-management position. In 1973 he was promoted to Marketing Manager, and six years later he became Business Manager in Carbide's Glycol Ethers group, within the Industrial Chemicals Division ("ICD"). Lightfoot was eventually asked to manage the Ethylene Amines group, which was also part of the ICD, and his salary grade was subsequently raised from Grade 16 to Grade 17. Defendant W.E. Shackelford, Vice-President of the ICD, promoted Lightfoot to Business Director of the Ethylene Amines group in 1988, but Lightfoot remained at salary Grade 17 even after the promotion.

According to defendants, Shackelford and Glen Kraft, another ICD vice-president, became dissatisfied with Lightfoot's work soon after his promotion to Business Director. Shackelford made annual performance appraisals of Lightfoot between 1987 and 1990 that were generally positive, but also discussed areas in which Lightfoot could improve. The 1988 review, for instance, noted several areas where Lightfoot's group was behind

schedule; and in the 1989 review Shackelford wrote that "[Lightfoot] needs improvement in the area of conceptualizing, communicating and causing to happen his ideas as to where the business should go . . . [;] he also has real opportunity to improve in the area of interpersonal skills."

In May 1990 Lightfoot was assigned to the position of Manager of Special Projects for the Ethylene Oxide Derivatives Department ("EOD") within ICD. Five months later he was reassigned as Marketing Manager for the Surfactants group within EOD. Throughout this period Lightfoot's salary was mired at Grade 17.

In the early 1990s, Carbide purchased a subsidiary chemical business from Rohm and Haas Chemical Company. In connection with that purchase, Carbide hired several Rohm and Haas employees who were familiar with the products and customers of this new business. Shackelford testified that the ICD's focus subsequently diverted from development of new products to maximizing the potential of the newly acquired product line. According to defendants, this shift in priorities necessitated a corresponding reduction of marketing staff. In a meeting (the "forced-ranking" meeting) with Harry Short, a business director, Robert Cellura, National Sales Manager of the EOD, and Robert Kisker, Business Director of Amines, Shackelford asked all the participants to rate the twelve marketing employees in Lightfoot's business group on a scale of one to five in several performance categories. They then ranked the employees according to their total scores.

Lightfoot and another marketing employee, Michael Goebel, received the lowest overall scores. Defendants testified that Lightfoot's poor ranking was principally

due to his low scores for "reassignment potential," reflecting Shackelford's previous, unsuccessful attempts to place Lightfoot in various positions outside his group.

On April 27, 1992, Lightfoot was notified that he would be terminated as part of a reduction-in-force program. As severance, he received his full pay and benefits until February 1993. At the time of the forced-ranking meeting, Lightfoot was fifty-six years old. Goebel, who was not terminated, was thirty-nine. Defendants testified that Goebel was retained despite his equally low score because his supervisor, Kisker, specifically lobbied on his behalf.

Lightfoot filed a discrimination charge with the EEOC on May 14, 1992, and in August 1992 he filed suit in the United States District Court for the Southern District of New York against Carbide, Shackelford and A.W. Lutz, President of the ICD. Lightfoot's complaint asserted claims for age discrimination in violation of the Age Discrimination in Employment Act ("ADEA"), 29 U.S.C. § 621 *et seq.*, the New York State Human Rights Law ("NYSHRL"), N.Y. Exec. Law § 290 *et seq.*, and the New York City Human Rights Law ("NYCHRL"), N.Y.C. Admin. Code § 8-502 (1991). Lightfoot also included a claim of discriminatory termination in violation of the Employee Retirement Income Security Act, 29 U.S.C. § 1001 *et seq.* ("ERISA"), and state-law claims for breach of an implied contract of permanent employment, recovery in quantum meruit or unjust enrichment of Carbide through products invented by Lightfoot during his employment by Carbide, and a claim of tortious interference with contract against Shackelford individually.

In a letter dated December 3, 1992, while this suit was pending, Shackelford informed Lightfoot that another Market Manager had resigned, and he offered Lightfoot "resumption of the Market Manager position [he] held prior to its elimination," on the same terms and conditions as existed at the time of his termination and with no loss of service credit. Lightfoot never responded to the letter, and in February 1993 he accepted a position with CRI, Inc., a consulting firm in the chemical industry.

In July 1993 defendants sought summary judgment dismissing Lightfoot's complaint; Lightfoot filed a cross-motion for partial summary judgment on his claims of age discrimination, quantum meruit and unjust enrichment. In an Order and Opinion dated May 12, 1994, Judge Robert P. Patterson Jr. denied Lightfoot's cross-motion and granted defendants partial summary judgment as to all but the ADEA and NYSHRL claims of age discrimination. The court also held that Lightfoot's rejection of Carbide's December 1992 offer of reinstatement barred Lightfoot from recovering back pay or front pay should he prevail in his age discrimination claims. Lightfoot moved for reargument of the summary judgment motions and later asked the court to vacate and amend its order of May 12; the court denied both motions.

In February 1995 the case was reassigned to Judge Harold Baer. In a Memorandum Order dated May 31, 1995, Judge Baer ruled that evidence of Lightfoot's participation in the invention of products for Carbide would not be admissible because the quantum meruit and unjust-enrichment claims had already been dismissed. In an oral ruling (never memorialized in writing) before

counsel's opening statements at trial, the court further held that Lightfoot's claims for damages arising from Carbide's failure to increase his salary grade in 1988 were time barred because Lightfoot failed to file a claim with the EEOC within 300 days of the alleged discriminatory act. Having determined that Lightfoot was no longer eligible for any remedy available under the ADEA, the court concluded that the ADEA claim must also be dismissed and that plaintiff's "sole remaining claim[was one for] compensatory damages under the New York State Executive Law."

Lightfoot's remaining state-law claim was tried before a jury in June 1995. The court reminded the jury that the only claim before it was the state-law claim and that the only remedy available to Lightfoot was an award of compensatory damages for mental anguish or humiliation suffered as a result of Carbide's discriminatory acts. On June 29, 1995, the jury returned a $750,000 verdict for the plaintiff.

The court entered judgment in favor of Lightfoot on July 26, 1995, and on August 5 Lightfoot moved for attorney's fees, expenses, and post-judgment interest pursuant to Rule 54(d) (2) of the Federal Rules of Civil Procedure and § 626(b) of the ADEA. On August 7 defendants filed a motion for either a complete new trial, a new trial on the issue of damages only, or a remittitur of the damage award. In an Order and Opinion dated October 24, 1995, the district court denied plaintiff's motion for fees and expenses but granted his request for post-judgment interest. The court also denied defendants' motion for a new trial but reduced the damage award to $75,000.

Lightfoot subsequently filed a motion seeking disqualification of Judge Baer on grounds of bias and vacatur of the order of October 24 reducing the jury's damage award. The court denied both motions. This appeal followed.

Lightfoot now claims on appeal that the district court erred in dismissing his claims (1) for back and front pay; (2) for Carbide's failure to pay him adequate compensation when he was promoted several years before his termination; and (3) for unjust enrichment arising from Lightfoot's assignment of invention patents to Carbide. He also asserts that the district court erroneously denied his claims for attorney's fees and that the court's reduction of damages from $750,000 to $75,000 denied his right to a jury trial.

Carbide claims on its cross-appeal that the district court erred in denying its motion for a new trial on the grounds that the verdict was against the weight of evidence and other prejudicial errors at trial.

DISCUSSION

A. District Court's Grant of Partial Summary Judgment

1. State-law claim of unjust enrichment

Lightfoot contends that during his years of employment by Carbide he participated in the development of several "new products and lines" and that he was promised "additional compensation" for these "inventions." In his complaint, he sought recovery of Carbide's

profits from these inventions under state-law principles of unjust enrichment.

Defendants answer that Lightfoot's claim is precluded by a Memorandum of Employee's Agreement (the "Agreement") in which Lightfoot agreed to assign to Carbide any inventions made in the course of his employment by Carbide. Agreeing with defendants, the district court granted defendants' summary judgment motion dismissing the unjust-enrichment claim. Lightfoot argues on appeal that summary judgment was inappropriate because the terms of the Agreement are ambiguous, and thus there is a genuine issue of material fact.

It is true that under the quasi-contractual doctrine of unjust enrichment, courts may infer the existence of an implied contract "to prevent one person who has obtained a benefit from another . . . from unjustly enriching himself at the other party's expense." *Chadirjian v. Kanian*, 506 N.Y.S.2d 880, 882 (App. Div. 1986) (citations omitted). Such an agreement will not be implied, however, "where there is a valid express agreement between the parties which explicitly covers the same specific subject matter for which the implied agreement is sought." *Id.* Lightfoot concedes that in 1959 he signed the following Agreement:

> In consideration of my employment by Union Carbide Corporation . . . in a capacity which makes available to me confidential information concerning the technology and trade secrets on which the Corporation's business depends, I agree . . . [t]o assign to Union Carbide Corporation all inventions made by me, alone or jointly with others, in the course of such employment, relating to the business of the

> Corporation or resulting from tasks specifically assigned to me by the Corporation.
>
> . . . .
>
> This Agreement does not, of course, bind either party to any specific period of employment.

Lightfoot signed the identical agreement in 1986.

Plaintiff finds these agreements ambiguous. *See Seiden Assocs. v. ANC Holdings*, 959 F.2d 425, 428 (2d Cir. 1992) ("Where language used is susceptible to differing interpretations . . . and where there is relevant extrinsic evidence of the parties' actual intent, the meaning of the words become[s] an issue of fact and summary judgment is inappropriate."). Contract terms are considered ambiguous if they are "capable of more than one meaning when viewed objectively by a reasonably intelligent person who has examined the context of the entire integrated agreement and who is cognizant of the customs, practices, usages and terminology as generally understood in the particular trade or business." *Nowak v. Ironworkers Local 6 Pension Fund*, 81 F.3d 1182, 1192 (2d Cir. 1996).

Lightfoot's cavil with the Agreements is that they do not contain any provision specifying the effect of an employee's termination on any claims he might later assert. Because contract terms are construed against the drafter, *see Monica Textile Corp. v. S.S. Tana*, 952 F.2d 636, 643 (2d Cir. 1991), he argues, silence in the Agreements should not be interpreted as a waiver of his "post-employment claim of damages for unjust enrichment arising from . . . wrongful termination as a result of age discrimination." Appellant's Brief at 44.

This argument conflates ambiguity and omission. The plain language of the Agreements is clear: Lightfoot agreed to an unconditional assignment of any and all inventions created by him while working for Carbide. The unconditional assignment is not rendered ambiguous by the parties' failure to anticipate specifically how Lightfoot's employment might end. Thus, while Carbide may indeed have been enriched by Lightfoot's efforts, we cannot say that such enrichment was unjust. There is no genuine issue of material fact on the issue of unjust enrichment, and the court's grant of summary judgment on this issue was appropriate.

2. Claims under ERISA

The district court also granted summary judgment dismissing Lightfoot's claim under ERISA. Section 510 of ERISA provides that "[i]t shall be unlawful for any person to discharge . . . a participant or beneficiary [of an employee benefit plan] . . . for the purpose of interfering with the attainment of any right to which such participant may become entitled under the plan . . . ." 29 U.S.C. § 1140. There is, however, no cause of action under section 510 where the loss of pension benefits "was a mere consequence of, but not a motivating factor behind, a termination of employment." *Dister v. Continental Group, Inc.*, 859 F.2d 1108, 1111 (2d Cir. 1988). To defeat summary judgment Lightfoot had to adduce some evidence from which a reasonable jury could conclude that Carbide terminated his employment with the intent to reduce his pension benefits.

Although Lightfoot's complaint alleged a "pattern or practice of age discrimination in employment intended to deprive older . . . employees of opportunity to opti-

mize the benefits available to them," he has come forward with no specific facts to support this allegation. He argues on appeal that pre-termination discrimination against him "must" have resulted from Carbide's desire to interfere with his pension benefits because it had that effect. This is a textbook illustration of the *post hoc ergo propter hoc* fallacy. *See Dister*, 859 F.2d at 1117 n.1 ("[M]ere cost savings and proximity to benefits are [in]sufficient . . . to create a genuine issue of fact requiring a trial"); *Humphreys v. Bellaire Corp.*, 966 F.2d 1037, 1044 (6th Cir. 1992) (citing *Dister*). Where an employee's ERISA claim is based only on a claim that the employee has been deprived of the opportunity to accrue additional benefits through more years of employment, "a prima facie case requires some additional evidence suggesting that pension interference might have been a motivating factor." *Turner v. Schering-Plough Corp.*, 901 F.2d 335, 348 (3d Cir. 1990). Lightfoot has presented no such evidence, and summary judgment was appropriate.

3. Dismissal of pre-termination claims

Lightfoot insists that he should have received a pay raise in 1988 when he was promoted to Business Director. Under the ADEA, a plaintiff in a "deferral state" such as New York must first file an administrative charge with the EEOC within 300 days of the alleged violation in order to preserve his right to bring a lawsuit. *See* 29 U.S.C. §§ 626(d), 633(b). A claim under the NYSHRL must then be filed within three years of the alleged discriminatory act. *See Murphy v. American Home Prods. Corp.*, 448 N.E.2d 86, 92-93 (N.Y. 1983).

To maintain his pay-disparity claim, Lightfoot would have had to file a charge with the EEOC within 300 days of his 1988 promotion and also file his complaint in federal court within three years of that promotion. He missed both of these deadlines. The district court thus properly dismissed the claim as time barred under both the ADEA and the NYSHRL.

Lightfoot attempts to circumnavigate the EEOC filing deadline by arguing that defendants' failure to pay him at an appropriate salary level should be treated as a continuing violation. We have recognized a continuing-violation exception to both Title VII and ADEA cases. Under the exception, a plaintiff who files a timely EEOC charge about a particular discriminatory act committed in furtherance of an ongoing policy of discrimination extends the limitations period for all claims of discriminatory acts committed under that policy even if those acts, standing alone, would have been barred by the statute of limitations. *See Lambert v. Genesee Hosp.*, 10 F.3d 46, 53 (2d Cir. 1993); *Cook v. Pan Am. World Airways*, 771 F.2d 635, 646 (2d Cir. 1985). The continuing-violation exception applies where there is evidence of specific discriminatory practices, such as the repeated use of discriminatory seniority lists or employment tests. *See Lambert*, 10 F.3d at 53; *Association Against Discrimination in Employment, Inc. v. City of Bridgeport*, 647 F.2d 256, 274-75 (2d Cir. 1981). Discrete incidents of discrimination that are unrelated to an identifiable policy or practice, on the other hand, "will not ordinarily amount to a continuing violation," unless such incidents are specifically related and are allowed to continue unremedied for "so long as to amount to a discriminatory policy or practice." *Van Zant v. KLM Royal Dutch Airlines*, 80 F.3d 708, 713 (2d Cir. 1996).

Lightfoot contends that between 1988 and his termination in 1992 he was repeatedly "demoted," and his pay grade remained frozen. He argues that the denial of a pay-grade increase, the alleged demotions, and his termination were part of an ongoing policy of "victimizing" older employees. Although the mere allegation of the existence of such a policy would be sufficient to withstand a challenge for failure to state a claim, something more is required to avoid summary judgment on the issue. Summary judgment is designed to pierce the pleadings to flush out those cases that are predestined to result in a directed verdict. Lightfoot has presented no evidence to support his claim of a discriminatory policy or a connection between his job reassignments and a discriminatory animus.

If Lightfoot was entitled to a pay raise because of the added responsibilities of his new position, the entitlement arose at the time of his promotion. "Completed acts such as a termination through discharge or resignation, a job transfer, or discontinuance of a particular job assignment, are not acts of a 'continuing' nature." *Malarkey v. Texaco*, 559 F. Supp. 117, 121 (S.D.N.Y. 1982), *aff'd*, 704 F.2d 674 (2d Cir. 1983) (per curiam) (affirming on grounds of failure to state a claim). Lightfoot's attempt to characterize as a continuing violation Carbide's alleged failure to compensate him adequately is therefore unavailing.

Lightfoot next argues that Carbide's failure to offer him adequate compensation should nevertheless be considered a continuing violation because Lightfoot continued to feel the effects of the lower pay up to the time he was terminated and because another manager was later promoted to the business director position at a

higher salary. This position is clearly without merit under *Malarkey*. *See* 559 F. Supp. at 121. A continuing violation is not established merely because an employee continues to feel the effects of a discriminatory act on the part of the employer. To hold otherwise would render meaningless the time limitations imposed on discrimination actions.

4. Back and front pay: the Reinstatement Letter

Lightfoot argues that summary judgment was improperly granted because there are genuine issues of fact as to whether Lightfoot acted reasonably in declining Carbide's offer of reinstatement in December 1992.

In *Ford Motor Co. v. EEOC*, 458 U.S. 219 (1982), the Supreme Court held that when an employer makes an unconditional offer to reinstate an employee terminated as a result of discrimination, the employee's rejection of that offer forecloses any claim for future front pay and tolls the continuing accrual of back-pay liability under Title VII of the Civil Rights Act of 1964. *Id.* at 227. Back pay is tolled as of the date of the employee's rejection. *Id.* The Court based its holding in *Ford* on the statutory duty of a Title VII complainant to mitigate damages, *see* 42 U.S.C. § 2000e-5(g), and the statute's underlying legislative purpose to "make the victims of unlawful discrimination whole by restoring them so far as possible . . . to a position where they would have been were it not for the unlawful discrimination." *Id.* at 230 (quoting *Albemarle Paper Co. v. Moody*, 422 U.S. 405, 421 (1975)) (internal quotation marks omitted).

The NYSHRL substantially tracks Title VII, both in its requirement that plaintiffs mitigate their damages by seeking and accepting alternative employment, *see Ryan*

v. New York State Thruway Auth., 889 F. Supp. 70, 80-81 (N.D.N.Y. 1995) (citations omitted), and in the legislative purpose behind the law, *see* N.Y. Exec. Law § 290(3) (describing purpose of article as, inter alia, "to eliminate and prevent discrimination in employment"). The rationale of *Ford*'s "unconditional offer" rule thus supports the application of that rule to NYSHRL plaintiffs as well as those seeking relief under Title VII.

Lightfoot maintains that he should not have had to accept the offer to resume his old job as Market Manager on the same terms and conditions as existed when he was fired because the salary he had been getting as Market Manager had been affected by Carbide's prior discriminatory actions, and he was entitled to a higher salary. That, however, is not the law. To toll the accrual of back-pay liability, an employer need only offer reinstatement to "a job substantially equivalent to the one he was denied," *Ford*, 458 U.S. at 232, not a job equivalent to the one to which the employee must prove he was entitled if he is to prevail in his suit. In short, an employer is not required to "insure the claimant against the risk that the employer might win at trial." *Id.*

Lightfoot also suggests that Carbide's offer was made in bad faith as part of a "maneuver to put Lightfoot back under the power of defendant Shackelford where he could be subjected to further harassment until a more propitious scenario for his termination could be devised." Appellant's Brief at 35. Although we are required, in reviewing a motion for summary judgment, to view the evidence in the light most favorable to the nonmoving party, and to draw all inferences in favor of that party, *see Yerdon v. Henry*, 91 F.3d 370, 375 (2d Cir. 1996), Lightfoot cannot defeat summary judgment with

his wholly unsupported claims that there was an ulterior motive behind the offer, *see Anderson v. Liberty Lobby*, 477 U.S. 242, 248 (1986) ("[A] party opposing a properly supported motion for summary judgment may not rest upon the mere allegations or denials of his pleading, but . . . must set forth specific facts showing that there is a genuine issue for trial." (quotations and citations omitted)). Lightfoot has failed to set forth anything concrete to support his position that the unconditional offer of employment was a ploy.

Lightfoot further contends that his rejection of Carbide's offer was reasonable because (1) he had already agreed to accept a position with a consulting company and (2) the stress of returning to work for Carbide (particularly under Shackelford) would have imperiled his health and well-being.

It is a matter of law that a commitment to a new employer does not preserve the employee's right to recover back pay for discriminatory termination from a previous employer. *See Ford*, 458 U.S. 234-36 ("The claimant who [rejects an offer of reinstatement in favor of remaining in a replacement job] does so . . . not because [the previous job] provides inadequate compensation, but because the value of the replacement job outweighs the value of the defendant's job supplemented by the prospect of full court-ordered compensation.").

As to Lightfoot's second point, although Lightfoot raised the issue of his medical condition in an affidavit attached to his original motion papers, he did not at that time present the district court with a physician's affidavit to support his claim. Instead, Lightfoot later attempted to introduce the affidavit of Dr. Stanley Portnow in a motion to vacate and amend the court's order

granting defendants' motion for summary judgment. The district court properly declined to consider Dr. Portnow's affidavit, as it had been in Lightfoot's possession for two years before the court's order and therefore was not "newly discovered evidence" that might have justified reconsideration of the court's decision.

Finally, Lightfoot contends that under Rule 408 of the Federal Rules of Evidence the reinstatement letter should not have been considered. Rule 408 bars the admission of statements and conduct made "in the course of compromise negotiations." *See Pierce v. F.R. Tripler & Co.*, 955 F.2d 820, 826-29 (2d Cir. 1992) (affirming trial court's exclusion of evidence of reinstatement offer made during settlement negotiations). By definition, an unconditional offer may not require the employee to abandon or modify his suit, and no such request was made by defendants. The offer therefore cannot be considered an offer of settlement or compromise.

In sum, because Lightfoot continued to receive his full salary and benefits as severance pay through February 1993, he cannot recover back pay for the period between his termination in April 1992 and his rejection of the offer of reinstatement in December 1992. Because his rejection of Carbide's offer foreclosed his claims to back pay and front pay after December 1992, the district court properly granted Carbide summary judgment on all of Lightfoot's claims for back and front pay.

5. Claims under the ADEA

There is confusion in the record as to whether the district court actually granted defendants summary judgment dismissing Lightfoot's claim under the ADEA, and, if it did not, whether it should have. In his order of May

12, 1994, Judge Patterson denied defendants' motion for summary judgment as to Lightfoot's claims under the ADEA and NYSHRL. In a ruling from the bench immediately before opening statements at the trial, Judge Baer noted that during a conference with counsel on June 20 he had resolved the issue of pre-termination damages against Lightfoot. Judge Baer concluded that in light of his decision denying pre-termination damages and Judge Patterson's earlier dismissal of claims for back and front pay, Lightfoot no longer had a viable claim for compensable damages under the ADEA. In the absence of an available remedy, the court granted defendants summary judgment dismissing Lightfoot's ADEA claim.

Lightfoot argues on appeal, however, that the court's dismissal of his claim was without effect because the court failed to enter the order of dismissal in the case docket. Rule 6(a) of the Civil Rules of the Southern District of New York provides in pertinent part:

> (a) A memorandum signed by the judge of the decision on a motion that does not finally determine all claims for relief shall constitute the order unless the memorandum directs the submission or settlement of an order in more extended form.
>
> The notation in the appropriate docket of such memorandum, or of an oral decision which does not direct the submission or settlement of an order in more extended form, shall constitute the entry of the order.

Lightfoot argues that because Judge Baer's order dismissing his ADEA claim was not properly entered in the docket pursuant to Rule 6(a), it is a nullity. Lightfoot cites no authority for this argument and we are not inclined to adopt so draconian a rule.

Rule 6(a) is a ministerial rule of procedure, intended to ensure that case dockets are properly maintained as useful sources of information for the litigants and court personnel. Where a court's oral order is clearly stated and both parties are present, there is no harm in overlooking the court's failure to comply scrupulously with the rule. On these facts, the harsh application of the rule urged by Lightfoot is required neither by considerations of fairness nor the interest of judicial economy.

Lightfoot's final argument is that even if the court was correct in its determination that he lacked a viable claim for damages under the ADEA, his claim should not have been dismissed; rather, the court could have granted equitable relief. The ADEA expressly authorizes courts to grant claimants "such legal or equitable relief as may be appropriate to effectuate the purposes of [the act], including without limitation judgments compelling employment, reinstatement or promotion, or enforcing the liability for [compensatory damages]." 29 U.S.C. § 626(b); *see also Whittlesey v. Union Carbide Corp.*, 742 F.2d 724 (2d Cir. 1984) (affirming award of front pay under ADEA).

In his complaint Lightfoot sought only money damages and "such other and further relief as to this Court may seem just and proper." While this general, ritualistic prayer for additional relief might have entitled Lightfoot to some form of equitable relief after he had established his claim under the ADEA, *see* Fed. R. Civ. P. 54(c), this boilerplate language is insufficient to defeat summary judgment where the relief specifically requested by the plaintiff is unavailable as a matter of law. In this case Lightfoot cannot say even now what equitable relief would have been appropriate. His rejection of Carbide's

offer indicates that reinstatement was not a viable form of relief. He mentions injunctions in his brief but does not specify what activity ought to have been enjoined. In short, his argument amounts to a claim that so long as some form of relief was conceivable, even if he himself cannot articulate what that relief might be, his claim ought not to have been dismissed. We disagree, and thus conclude that summary judgment was properly granted.

B. Carbide's Motion for a New Trial

1. Verdict against the weight of the evidence

Defendants protest that the jury's verdict was contrary to "the great weight of the evidence." The denial of a motion to set aside a verdict as against the weight of the evidence, however, is not subject to appellate review. *Stonewall Ins. Co. v. Asbestos Claims Management Corp.*, 73 F.3d 1178, 1199 (2d Cir. 1995), *modified*, 85 F.3d 49 (2d Cir. 1996).

The task of reviewing and weighing all of the evidence presented at trial simply imposes too great a burden on the appellate court. *Id.* Accordingly, while defendants were "entitled to argue to the trial judge that the verdict [was] against the weight of the evidence . . . the denial of that challenge is one of those few rulings that is simply unavailable for appellate review." *Id.* Similarly, defendants may not obtain review of the denial of a new trial on the ground that the jury's damage award was against the weight of the evidence. *See Haywood v. Koehler*, 78 F.3d 101 (2d Cir. 1996) (applying *Stonewall* to preclude review of denial of a new trial where jury found defendants liable for use of excessive force but awarded no damages).

2. Trial errors

Defendants contend that various evidentiary errors at trial rendered the proceeding fundamentally unfair to them. They point to the following: (1) allowing one of Lightfoot's witnesses, Dr. Cellura, to testify as an expert that age was a factor in Lightfoot's termination, that there was age discrimination at Carbide, and that Carbide took a particular interest in young, talented people; (2) permitting Lightfoot's counsel to question a witness about Carbide's profits and "emissions problems" at Carbide plants in West Virginia and Bhopal; and (3) allowing Lightfoot's counsel to discuss specific dollar figures in his closing argument on damages.

A motion for a new trial " 'ordinarily should not [be granted] unless [the trial court] is convinced that the jury has reached a seriously erroneous result or that the verdict is a miscarriage of justice.' " *Hygh v. Jacobs*, 961 F.2d 359, 365 (2d Cir. 1992) (quoting *Smith v. Lightning Bolt Prods., Inc.*, 861 F.2d 363, 370 (2d Cir. 1988)). A trial judge's decision to grant or deny such a motion is reviewed for abuse of discretion. *Song v. Ives Labs., Inc.*, 957 F.2d 1041, 1047 (2d Cir. 1992).

(a) Testimony of Dr. Cellura

Dr. Robert P. Cellura, who was employed by Carbide from 1976 to 1992, testified against Carbide. Cellura participated in the forced-ranking meeting that resulted in Lightfoot's termination. On redirect examination, Lightfoot's counsel asked Cellura whether he believed that any factor other than Lightfoot's performance influenced the decision to terminate Lightfoot. Cellura testified that he believed age discrimination had been involved, pointing to three factors: (1) a decline in the

average age of Lightfoot's group and of all of Carbide's business directors after the reorganization; (2) the decision to terminate Lightfoot rather than a similarly ranked younger employee; and (3) a decline in the average age of Carbide's highest-paid employees. Defendants contend that this testimony should have been excluded because it lacked probative value, was not based on Cellura's personal knowledge, and went to the ultimate issue in the case.

The Federal Rules of Evidence allow a lay witness to testify in the form of an opinion, provided such testimony "is limited to those opinions or inferences which are (a) rationally based on the perception of the witness and (b) helpful to a clear understanding of the witness' testimony or the determination of a fact in issue." Fed. R. Evid. 701. The fact that the lay opinion testimony bears on the ultimate issue in the case does not render the testimony inadmissible. Fed. R. Evid. 704(a); *see United States v. Rea*, 958 F.2d 1206, 1214-15 (2d Cir. 1992) ("Since neither Rule 701 nor Rule 704(a) limits the subject matter of lay opinion testimony, there is no theoretical prohibition against allowing lay witnesses to give their opinions as to [the ultimate issue in the case]."). The admissibility of Cellura's testimony therefore depends upon whether it satisfies the rational-basis and helpfulness requirements of Rule 701.

The rational-basis requirement of Rule 701 " 'is the familiar requirement of first-hand knowledge or observation.' " *Rea*, 958 F.2d at 1215 (quoting Fed. R. Evid. 701 advisory committee's note on 1972 Proposed Rules). When Lightfoot's counsel initially elicited from Cellura his opinion that age was a factor in Lightfoot's termination, the district court sustained defense counsel's objections to the unsupported opinion and told Cellura:

> You don't have any reason for saying that [age was a factor in Lightfoot's termination]. You have given us a conversation, have you? This isn't gossamer we are working with up here.
>
> What do you have that Mr. Shackelford said to support that proposition that he did or that he loved or that he ate or that he smelled?

In response to the court's admonition, Cellura described two primary factors upon which he claimed to base his opinion: the declining average age of various categories of Carbide employees and Carbide's retention of young Goebel, who was ranked similarly to Lightfoot in the forced-ranking process. Cellura had previously testified that he was one of five managers working directly under defendant Shackelford and that he was personally involved in the forced-ranking procedure that led to the termination of Lightfoot. Cellura was thus in a position to have acquired personal knowledge of the facts that formed the basis of his opinion. The district court commendably sought to ensure that Cellura's testimony focused on those objective facts.

Even when a lay opinion is rationally based upon objective facts, it may still be inadmissible if it does not help the jury to understand the witness' testimony or to decide a fact in issue. Fed. R. Evid. 701(b). This "helpfulness" requirement "is designed to provide 'assurance[ ] against the admission of opinions which would merely tell the jury what result to reach.' " *Rea*, 958 F.2d at 1215 (quoting Fed. R. Evid. 704 advisory committee's note on 1972 Proposed Rules). The challenged testimony consisted primarily of Cellura's description of the factual basis of his opinion that age was a factor in Lightfoot's termination. Cellura had established a solid

foundation of his intimate involvement with Carbide's operation and his opinion was thus based on observations about Carbide's decisionmaking process. This testimony was sufficiently helpful to be admissible.

(b) Cross-examination of Shackelford and Kraft

Defendants further contend that the trial court erred in allowing Lightfoot's counsel to cross-examine Shackelford about Carbide's earnings between 1989 and 1993, and to question Glen Kraft about emissions problems at Carbide's plants in West Virginia and Bhopal, India. Defendants regard these questions as an attempt to portray Carbide as a disreputable corporate citizen with ample financial resources to compensate victims like Lightfoot. They add that the trial judge's participation in the Bhopal questions amounted to tacit approval of that line of questioning.

As to the questions about Carbide's income and financial status, defendants never objected to this testimony. Having failed to make a timely objection at trial, defendants are limited to "plain error" review of the issue. *See* Fed. R. Evid. 103(a) (1); *Berner v. British Commonwealth Pac. Airlines*, 346 F.2d 532, 542 (2d Cir. 1965) ("[C]hallenge [to defendants' closing argument], raised for the first time on the motion for new trial, came too late.").

There was no error here, plain or otherwise, since Carbide's opening statement brought up Bhopal and made an issue of Carbide's financial straits:

> Union Carbide beginning in the mid-1980's was a company that was having serious financial problems. I'm sure most of you know about Bhopal,

> which cost the company a lot of money. There was a takeover attempt that cost the company a lot of money, and Union Carbide generally had to start reevaluating its business that resulted in the company selling off a lot of businesses that they owned; it resulted in a lot of cost cutting and it resulted in a lot of reductions in force to a lot of people.

The cross-examination of Shackelford simply explored the basis for that opening statement. During plaintiff's cross-examination of defendants' witness, Glen Kraft, the Bhopal tragedy was raised and questions were asked about poisonous emissions and their cause. The court interjected with three or four questions before concluding that the entire subject matter was "totally irrelevant in my view, but since I was interested, I asked those questions."

The court's comment that the questions were irrelevant was sufficient to alert the jury that it should not take that information into account in deciding the case. There is no error.

(c) Plaintiff's closing argument

Plaintiff's counsel, in summation, asked for a specific dollar amount as damages. Defendants now urge us to adopt a per se rule prohibiting counsel from suggesting a specific sum as damages. We decline to do so.

While at least one circuit has such a rule, *see Waldorf v. Shuta*, 896 F.2d 723, 744 (3d Cir. 1990) ("[P]laintiff's counsel may [not] request a specific dollar amount for pain and suffering in his closing remarks."), we favor a more flexible approach. It is best left to the discretion of the trial judge, who may either prohibit counsel from

mentioning specific figures or impose reasonable limitations, including cautionary jury instructions. *See Consorti v. Armstrong World Indus., Inc.*, 72 F.3d 1003, 1016 (2d Cir. 1995) (encouraging trial judges to prohibit counsel from suggesting specific monetary awards for pain and suffering), *vacated on other grounds*, 116 S. Ct. 2576 (1996); *Mileski v. Long Island R.R. Co.*, 499 F.2d 1169, 1174 (2d Cir. 1974). Here, counsel reviewed the evidence on damages and asked for an award of $1,500,000. The court instructed the jury that damages should be awarded "only upon and only in proportion to a showing as to the nature, duration and severity of his condition."

Although the jury's award of $750,000, exactly half of the demand by plaintiff's counsel, suggests that the jurors may have been influenced by counsel's mention of a particular dollar amount, in context, the closing and the charge to the jury do not support defendants' claim that the jury was *unfairly* influenced. *Cf. Consorti*, 72 F.3d at 1016 (concluding that plaintiff's counsel's suggestion of a specific amount of damages did not unfairly influence jury that awarded precise amount suggested).

(d) The mixed-motive jury instruction

Finally, defendants challenge the court's inclusion of a "mixed-motive" instruction to the jury. Age discrimination suits under the NYSHRL get the same analysis as claims under Title VII or the ADEA. *See Tyler v. Bethlehem Steel Corp.*, 958 F.2d 1176, 1180 (2d Cir. 1992). Under Title VII, a plaintiff is entitled to a mixed-motive instruction, which shifts to the defendant the burden of showing that the plaintiff would have been fired even if there were no discriminatory motivating factor, *see Price*

Waterhouse v. Hopkins, 490 U.S. 228, 260 (1989) (White, J., concurring in the judgment), when the evidence "is sufficient to allow a trier to find both forbidden and permissible motives." *Ostrowski v. Atlantic Mut. Ins. Cos.*, 968 F.2d 171, 181 (2d Cir. 1992).

In *Ostrowski* we recognized that a plaintiff may carry his burden of proving that a forbidden factor was a motive in his termination through either direct or circumstantial evidence, *see id.* at 181-82; but a mixed-motive instruction is not required unless such evidence includes "conduct or statements by persons involved in the decisionmaking process that may be viewed as directly reflecting the alleged discriminatory attitude." *Id.* at 182 ("[P]urely statistical evidence would not warrant [a mixed motive charge]; nor would . . . 'stray' remarks in the workplace by persons who are not involved in the pertinent decisionmaking process.").

The district court properly found that Lightfoot produced sufficient evidence to earn a mixed-motive instruction. Lightfoot testified, for example, that Shackelford expressed surprise and disbelief when Lightfoot said he wanted to work until he was seventy years old. In addition to his opinion that age was a factor in Lightfoot's termination, Dr. Cellura testified that Carbide "has a high potential category where they take particular interest in young talented people." While the quantum of Lightfoot's evidence may have been less than that in *Ostrowski*, it was nevertheless adequate to support the instruction given by the court.

C. Attorney's Fees

While Lightfoot's only claim that survived summary judgment and went to trial was a state claim under the

NYSHRL, Lightfoot asserts that he is entitled to an award of attorney's fees as a prevailing plaintiff under the ADEA. The elements of an age discrimination claim are essentially the same under the ADEA and the NYSHRL, although the relief available under the two statutes is not identical. A prevailing party in an action brought under the ADEA is entitled to recover attorney's fees, *see Hagelthorn v. Kennecott Corp.*, 710 F.2d 76, 86 (2d Cir. 1983), but the NYSHRL does not provide for an award of fees, *see New York City Bd. of Educ. v. Sears*, 443 N.Y.S.2d 23, 25 (App. Div. 1981).

Lightfoot first argues that the ADEA claim was either never actually dismissed or was improperly dismissed. As discussed above, *see supra* Part A.5., this argument is without merit.

Lightfoot next contends that even if his ADEA claim was properly dismissed, he is entitled to attorney's fees under *Dominic v. Consolidated Edison Co.*, 652 F. Supp. 815 (S.D.N.Y. 1986), *aff'd*, 822 F.2d 1249 (2d Cir. 1987) and *Milwe v. Cavuoto*, 653 F.2d 80 (2d Cir. 1981). *Dominic* is clearly inapposite. Defendants in that case contested the size of the fee award requested by plaintiff's counsel after plaintiff actually prevailed in an action under the ADEA. Defendants argued that plaintiff was not entitled to recover fees for all of the time spent on the case because he had prevailed on only one of five claims originally included in his complaint. The court held that because all five claims alleged age discrimination, and the legal theories involved in all five were "inextricably intertwined," no reduction in the fee award was required. Lightfoot maintains that his claims under the ADEA and NYSHRL were similarly "intertwined," and that he is therefore entitled to recover fees for both

claims under *Dominic*. We disagree. *Dominic* addresses not whether a plaintiff is entitled to attorney's fees, but how much he may recover once he has established that he *is* entitled to recover them.

Lightfoot's invocation of *Milwe* is similarly misplaced. In *Milwe* the plaintiff sued various law-enforcement officials under 42 U.S.C. § 1983 and state tort law. Her complaint alleged that one officer had knocked her to the ground and broken her nose while the others watched, and that several others had violated her constitutional rights by filing a false affidavit to procure her arrest several days after the original incident. A jury found one officer liable for the assault under both § 1983 and state tort law and awarded damages of $1 and $1,320 respectively on those claims. The jury also found for plaintiff on her remaining constitutional claim and state-law claim for false arrest. The district court denied plaintiff's motion for attorney's fees, and the plaintiff appealed.

On appeal the defendants in *Milwe* argued that a fee award would be inappropriate because the jury had awarded substantial damages only on the pendent state-law assault claim, and not on the constitutional claim arising from the same incident. We rejected this argument, holding that "attorney's fees are available in cases in which the plaintiff prevails on a wholly statutory, non-civil rights claim pendent to a substantial constitutional claim." *Milwe*, 653 F.2d at 84. The *Milwe* panel reasoned that such a fee award "furthers the Congressional goal of encouraging suits to vindicate constitutional rights without undermining the longstanding judicial policy of avoiding unnecessary constitutional decisions." *Id.* (quotations omitted). Lightfoot contends that *Milwe* estab-

lished a "substantiality test" under which a plaintiff is entitled to attorney's fees when he prevails on a state-law claim arising out of a common nucleus of operative fact with a federal claim pursuant to which attorney's fees would be available. We decline to adopt so broad an interpretation of *Milwe*.

The holding in *Milwe* was expressly limited to plaintiffs who prevail on a statutory claim *pendent* to a substantial constitutional claim. Lightfoot's claim under the ADEA was properly dismissed prior to trial, and his action under the NYSHRL was therefore no longer pendent to anything federal when he prevailed at trial. In addition, the underlying rationale of *Milwe* was based largely on the policy concern of avoiding unnecessary constitutional decisions—a policy not implicated where the asserted basis for a fee award is merely a federal statute such as the ADEA. Finally, we see no reason to reward those plaintiffs who supplement their valid claims under the NYSHRL with meritless claims under the ADEA by allowing them to circumvent the state-law rule that attorney's fees are not available under the NYSHRL. Lightfoot is thus not entitled to an award of attorney's fees as a prevailing plaintiff on this basis.

D. Remittitur of the Damages Award

After a full trial on liability and damages, the jury returned a verdict for Lightfoot and awarded him $750,000 in compensatory damages under the NYSHRL. Defendants moved for a remittitur of the damages award, or, in the alternative, a partial new trial on damages. The district court granted defendants' motion for remittitur, outrightly reducing the jury's award to $75,000. Lightfoot argues that because determination of an award of

damages lies within the province of the jury, a court's outright reduction of a jury's award without offering the plaintiff the option of a new trial on damages denies the plaintiff his constitutional right to a jury trial. Plaintiff is right.

Where a jury has awarded damages in an amount considered excessive by the trial court, "[i]t is not among the powers of the . . . court . . . simply to reduce the damages without offering the prevailing party the option of a new trial." *Tingley Sys., Inc. v. Norse Sys., Inc.*, 49 F.3d 93, 96 (2d Cir. 1995) (reviewing court's grant of remittitur of damages awarded under Connecticut Unfair Trade Practices Act); *Phelan v. Local 305 of the United Ass'n of Journeymen and Apprentices of the Plumbing & Pipefitting Indus.*, 973 F.2d 1050, 1064 (2d Cir. 1992). This rule derives from the trial-by-jury protections of the Seventh Amendment. *Cf. Kennon v. Gilmer*, 131 U.S. 22, 29 (1889). A trial court may, however, condition denial of a defendant's motion for a new trial on the plaintiff's stipulation to a remittitur in a stated amount. *See Tingley*, 49 F.3d at 96; 11 Wright, Miller & Kane, *Federal Practice and Procedure* § 2815 (1995).

Accordingly, the district court erred in granting defendants' motion for a remittitur without offering Lightfoot the option of a new trial on damages. We must remand to allow Lightfoot the opportunity to exercise this option. The Supreme Court's recent decision in *Gasperini v. Center for Humanities*, 116 S. Ct. 2211, 2218 (1996) sets forth the applicable standards to determine excessiveness and the appropriateness of remittitur under New York law.

CONCLUSION

This matter is remanded to the district court for reconsideration of the court's grant of a remittitur of damages. We have considered all of the remaining claims raised by plaintiff and defendants and, finding them to be without merit, we affirm in other respects the judgment of the district court.

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

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92 Civ. 6411 (HB)
Filed July 24, 1995

RICHARD HALL LIGHTFOOT,

Plaintiff,

—against—

UNION CARBIDE CORPORATION, A.W. LUTZ, PRESIDENT, INDUSTRIAL CHEMICALS DIVISION and W.E. SHACKELFORD, VICE PRESIDENT, INDUSTRIAL CHEMICALS DIVISION,

Defendants.

CIVIL JUDGMENT

A Jury Trial before the Honorable Harold Baer, Jr., U.S.D.J. having begun on June 23, 1995, and at the conclusion of the trial the jury having returned a verdict in favor of plaintiff in the sum of $750,000.00, it is

ORDERED, ADJUDGED AND DECREED: That the plaintiff have judgment in the sum of $750,000.00 as against the defendants.

SO ORDERED

/s/ HAROLD BAER, JR.
U.S.D.J.

Dated: New York, New York
July 11, 1995

JAMES M. PARKISON
Clerk

BY: /s/ JOHN S. HAGEN
Deputy Clerk

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

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92 Civ. 6411 (HB)

RICHARD HALL LIGHTFOOT,

Plaintiff,

—v.—

UNION CARBIDE CORPORATION, A.W. LUTZ, PRESIDENT, INDUSTRIAL CHEMICALS DIVISION, and W.E. SHACKELFORD, VICE PRESIDENT, INDUSTRIAL CHEMICALS DIVISION,

Defendants.

Before:

HON. HAROLD BAER, JR.,

District Judge

APPEARANCES

WISEHART & KOCH
Attorneys for Plaintiff
ARTHUR M. WISEHART
MICHAEL H. PRINCE

MCDERMOTT, WILL & EMERY
Attorneys for Defendants
JOEL E. COHEN
NANCY I. SOLOMON

(In open court, jury present)
(3:00 P.M.)

THE COURT: Sorry to keep you for the period of time that you had in the jury room following your note to me, which I have marked as Court Exhibit 10A which reads, "We have reached a verdict," but we were in the midst of summations in another case. So it was hard to do anything about it until it was over. But we now have you and your note, and my clerk will take the verdict.

THE CLERK: Would the foreperson please rise.

Has the jury agreed upon a verdict?

THE FOREPERSON: Yes, we have.

THE CLERK: To question 1, was age discrimination a motivating factor in the defendants' decision to terminate the plaintiff?

THE FOREPERSON: Answer yes.

THE CLERK: To question 2, would the defendants have made the same decision to terminate plaintiff even if it had not taken the plaintiff's age into account?

THE FOREPERSON: Answer no.

THE CLERK: To question 3, specify the amount of compensatory damages to be awarded to the plaintiff.

THE FOREPERSON: Amount $750,000.

THE COURT: Well, thank you, ladies and gentlemen.

Do either of you want the jury polled? Hearing nothing, I will simply thank you for your efforts and indeed tell you that I think this system, and I am sure you share the view, really can't work without people like yourselves.

I'm sure counsel join me in thanking you for the time that you took out of your busy lives to be with us, think about this case pretty exclusively for a few days and then deliberate and come to a verdict, and you are discharged.

(Jury dismissed)

THE COURT: If there are any motions, I would ask that they be made on papers and in accordance with the rules of Federal Rules of Civil Procedure, and I thank you all for being here.

MR. WISEHART: Thank you, your Honor.

(Trial concluded)

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

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92 Civ. 6411 (HB)

RICHARD HALL LIGHTFOOT,

Plaintiff,

—against—

UNION CARBIDE CORP., et al.,

Defendants.

OPINION AND ORDER

HAROLD BAER, JR., District Judge:

Plaintiff Richard Lightfoot moves for an Order of recusal, pursuant to 28 U.S.C. § 455. For the reasons discussed below, the motion is DENIED.

BACKGROUND

Plaintiff brought this action alleging discriminatory termination by his employer and his supervisors. Following a jury trial, the jury found for plaintiff and awarded him $750,000 in damages. I remitted the damages to $75,000 and both parties appealed. The Second Circuit affirmed in part, vacated in part and vacated to this Court for further proceedings. *Lightfoot v. Union Carbide Corp.*, 110 F.3d 898

(2d Cir. 1997). Specifically, the Circuit held that my remittitur order was improper in that it did not afford plaintiff the option of a new trial on damages. *Id.* at 914-15.

Following the remand, the parties were called in for a pretrial conference on May 9, 1997. No court reporter was present. At the conference, I urged the parties to settle the matter. When defendant indicated it would be unwilling to settle for much more than $75,000 plus litigation costs, plaintiff indicated this was insufficient. In response to this comment of plaintiff's, I suggested that plaintiff should bear in mind my prior remittitur in assessing the wisdom of trying the case again. I noted my view that, based on the evidence presented at the first trial, plaintiff did not suffer more than $75,000 in damages. This motion followed.

DISCUSSION

The applicable standards regarding recusal require that "[a]ny justice, judge, or magistrate of the United States shall disqualify himself in any proceeding in which his impartiality might reasonably be questioned." 28 U.S.C. § 455(a). Furthermore, a judge "shall also disqualify himself . . . [w]here he has a *personal* bias or prejudice concerning a party, or *personal* knowledge of disputed evidentiary facts concerning the proceeding." 28 U.S.C. § 455(b)(1) (emphasis added). Plaintiff is correct in pointing out that the standard set forth in Section 455 does not require actual bias but merely the reasonable appearance of bias, *see United States v Helmsley*, 760 F. Supp. 338, 341 (S.D.N.Y. 1991), *aff'd*, 963 F.2d 1322 (2d Cir. 1992), and constitutes a significant change in recusal law, *see United States v. Pepper & Potter, Inc.*, 677 F. Supp. 123, 125 (E.D.N.Y. 1988). Nevertheless, recusal is inappropriate here.

Courts have long recognized that "[a] judge is as much obliged not to recuse himself when it is not called for as he is obliged to when it is." *In Re Drexel Burnham Lambert, Inc.*, 861 F.2d 1307, 1312 (2d Cir. 1988). Furthermore, dissatis-

faction with a legal ruling—such as my decision to grant a remittitur—is an insufficient basis for recusal, for it would in effect allow "judge shopping" by plaintiffs. As the Second Circuit has recognized, "the trial judge must carefully weigh the policy of promoting public confidence in the judiciary against the possibility that those questioning his impartiality might be seeking to avoid the adverse consequences of his presiding over their case." *Id.*

Principally, plaintiff argues that my comments at the pre-trial conference[1] to the effect that plaintiff should keep in mind my view of the evidence constitute an expression of bias necessitating recusal. Even under the more relaxed requirements of Section 455, recusal here would be inappropriate. My comments; merely reiterated my view (as expressed in the remittitur order) that, based on the evidence presented at plaintiff's first trial, the damages were insufficient to sustain a $750,000 verdict (or any verdict in excess of $75,000). Such comments do not require recusal for two reasons.

First, "opinions formed by the judge on the basis of facts introduced . . . in the course of the current proceedings, *or of prior proceedings*, do not constitute a basis for a bias or partiality motion unless they display a deep-seated favoritism or antagonism that would make fair judgment impossible." *Liteky v. United States*, 510 U.S. 540, 555 (1994) (emphasis added). Thus, "it is clear that the following types of evidence will not support a recusal motion: judicial rulings based on evidence presented at trial; [or] the court's observation regarding the legal sufficiency of evidence presented at trial." *Bin-Wahad v. Coughlin*, 853 F. Supp. 680, 686 (S.D.N.Y. 1994) (citations omitted). As my comments at the pre-trial conference were based on my assessment of the damages evidence presented at trial, they do not support a recusal motion.

Second, it is likely that plaintiff's damages evidence at any, retrial will differ from the evidence offered at the first trial. This is almost inevitable, even if the same witnesses are

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[1] It should be noted that these comments were made in an attempt to encourage the parties to settle the case.

called. While I believe the evidence presented at the first trial did not establish damages of $750,000, such a conclusion does not foreclose the possibility that the damages presented at a retrial will in fact support a jury verdict in excess of $75,000. Such an assessment simply cannot be made at this time and my comments were not intended to convey any prejudgment as to the sufficiency of the evidence plaintiff may present at the retrial. Furthermore, I do not believe that a reasonable person would construe my comments as indicating any such prejudgment on my part.

Finally, plaintiff points to my reference to plaintiffs appellate brief as a lot of "silliness" or "nonsense" as further proof of my impartiality. Such a contention also fails. First, as defendants point out, I referred to both parties' briefs as a lot of silliness and apparently my view was vindicated (albeit in more decorous language) by the Court of Appeals, which rejected the vast majority of both parties' assignments of error. Second, my views regarding plaintiff's counsel's legal strategy—whatever they may be—do not constitute grounds for recusal. "[C]ourts have drawn a sharp distinction between alleged hostility between judge and party and alleged hostility between judge and attorney. Except in extreme and rare cases. the appearance of hostility on the part of the judge *toward an attorney* has been ruled an insufficient basis for recusal." *Helmsley*, 760 F. Supp at 342 (citation omitted). Certainly, my comments with respect to the merit of plaintiff s appellate brief reflect only my views of his attorney, if anything, and not my views of plaintiff himself.[2] Accordingly, such comments do act support recusal.

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[2] While on the subject of plaintiff's attorney's conduct, the Court notes that plaintiffs counsel, Arthur Wisehart, has a peculiar habit of filing recusal motions. Not only has he previously filed a recusal motion in this case (which was denied), but defendants identify at least four other cases in which he has filed such motions, often based on evidentiary or other rules of the judge in question. On at least one occasion, the judge in question chastised Mr. Wisehart and noted that "[t]he material that Mr. Wisehart has provided on the recusal subject is so scurrilous and so baseless and so ridiculous that I cannot even begin to be fair to any parties in this case after reading this." *Lipin v. American Nat'l Red Cross*, No. 1997

CONCLUSION

For the reasons discussed above, Plaintiff's motion is DENIED. The case is added to the January 1998 trailing trial calendar. The parties are instructed to exchange expert reports, if any, on or before December 1, 1997.

SO ORDERED

Dated: August 28, 1998
New York, New York

/s/ HAROLD BAER, JR.
U.S.D.J.

WL 279912 (2d Cir. May 22, 1997) at *5 n.1 (quoting New York State Supreme Court Justice Moskowitz). While the same is not true of the instant recusal motion, Mr. Wisehart's practice calls into question either his good faith and adherence to Rule 11 in filing such motions or his grasp of the applicable legal issues. Recusal is a drastic remedy, not to be taken lightly. Mr. Wisehart's practice of filing recusal motions when he disagrees with a judge's rulings undermines the gravity with which such motions should be created and impugns judicial integrity by implying rampant judicial bias. I urge Mr. Wisehart take seriously my and other judge's admonitions in this regard. That said, I emphasize that my decision here is based on the law, as discussed above, not on my views as to Mr. Wisehart's probity or wisdom and not on my predilections about whether or not I would choose to retry this case if I had the choice.

UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

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92 Civ. 6411 (HB)

RICHARD HALL LIGHTFOOT,

Plaintiff,

—against—

UNION CARBIDE CORPORATION, A.W. LUTZ, PRESIDENT, INDUSTRIAL CHEMICALS DIVISION and W.E. SHACKELFORD, VICE PRESIDENT, INDUSTRIAL CHEMICALS DIVISION,

Defendants.

APPEARANCES

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For Plaintiff.

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For Defendants.

ORDER AND OPINION

HAROLD BAER, JR., United States District Judge.

Plaintiff Richard Lightfoot commenced this action against his former employer, Union Carbide, and Union Carbide executives A.W. Lutz and W.E. Shackelford (collectively, the "defendants") alleging, *inter alia*, wrongful termination based on age discrimination under the Age Discrimination in Employment Act of 1967, *as amended*, 29 U.S.C. § 621 *et seq.* ("ADEA"), and under the New York State Executive Law 5 296 (McKinney 1993) ("NYSHRL"). After trial, the jury found in favor of Lightfoot and awarded him $750,000 in compensatory damages under the NYSHRL.

Lightfoot now moves for attorney's fees under section 626(b) of ADEA. The defendants move for a new trial, pursuant to Rule 59(a) of the Federal Rules of Civil Procedure, and in the alternative, for a new trial on the issue of damages, or for a remittitur.

For the reasons that follow, Lightfoot's motion for attorneys' fees is denied; the defendants' motion for a new trial is denied; the defendants' motion for a new trial on the issue of damages is denied; and the defendants' motion for remittitur is granted in accordance with this opinion.

I. Background

Traced to its origins, Lightfoot's suit alleged a panoply of claims against the defendants including breach of contract, quantum meruit, unjust enrichment, tortious interference with contract, as well as age discrimination under ADEA and the NYSHRL. Judge Patterson dismissed all of Lightfoot's claims except for those brought under ADEA and the NYSHRL. *See* Order and Opinion, 92 Civ. 6411 (RPP), May 12, 1994. Regarding Lightfoot's discrimination claims, Judge Patterson held that

> Defendants' motion for Summary judgment on plaintiff's ADEA and New York State Human Rights claims is denied . . . Although plaintiff may pursue his federal and New York State age discrimination claims he cannot recover damages for lost wages because he continued to receive full pay as a severance benefit after he was offered his job back. Summary Judgment is granted in the defendants' favor in all causes of actions as to Carbide's liability for backpay.

Id. at 8-12. In a subsequent opinion, Judge Patterson further ruled that Lightfoot was not entitled to damages for front pay. *See* Order and Opinion, 92 Civ. 6411 (RPP), July 28, 1993, at p. 3.

Because Judge Patterson's rulings stripped Lightfoot of any compensable damages under ADEA, I dismissed that claim, over the objection of the plaintiff. *See* Trial Tr. at pp. 2- 5. Accordingly, the only claim Lightfoot presented to the jury was age discrimination under the NYSHRL. It was that claim on which the jury an June 29, 1995 awarded Lightfoot $750,000 in compensatory damages.

II. Discussion

A. *Lightfoot's Motion For Attorneys' Fees and Post-judgment Interest*

1. *Attorneys' Fees*

Lightfoot argues that in his view, the ADEA claim was never dismissed and he is entitled to attorneys, fees as a prevailing party under that statute. 28 U.S.C. § 626(b).[1] Although Lightfoot correctly notes that Judge Patterson did not dismiss his ADEA claim, he overlooks the fact that I did. *See* Trial Tr. at pp. 2-5.

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[1] Because attorneys' fees are not recoverable under the NYSHRL, Lightfoot is entitled to attorneys' fees only if his ADEA claim was alive and well at the trial.

Lightfoot's more substantial argument, although equally unavailing, is that I improperly dismissed his ADEA claim. Because Judge Patterson's prior rulings effectively deprived Lightfoot of any relief under ADEA, *see supra*, pp. 2-3, I dismissed that claim just before the commencement of trial. *See supra*, p. 3. In *McLaughlin v. State of New York, Governor's Office of Employee Relations*, 784 F. Supp. 961 (N.D.N.Y. 1992), a case that addresses the status of a Title VII claim without a remedy, the plaintiff sued her employer for sexual harassment under Title VII. The employer moved for summary judgment, arguing that because the plaintiff was not fired or demoted, which might have entitled her to backpay, she had no viable remedy and her claims should be dismissed. In agreeing with the employer's reasoning, the court stated that "[t]he 'case or controversy' requirement of Article III of the United States Constitution dictates that a plaintiff cannot maintain a suit in which no relief can be granted." *Id.*, at 973 (citation omitted) The court further held that

> a threshold to recovery of attorneys' fees is that the plaintiff must prevail *in the underlying Title VII action*. If a plaintiff does not prevail in the underlying action, then she cannot recover attorney's fees under Title VII.
>
> The effect of the "prevailing party" rule is that plaintiff cannot rely upon the possible availability of attorney's fees as a remedy that would allow her to withstand defendants motion for summary judgment. A suit *cannot be maintained for the sole purpose of recovering attorney's fees*.

Id. at 980 (emphasis added) (citations omitted).

Similarly, in another case where no viable remedy was available to a Title VII plaintiff, the Seventh Circuit dismissed the plaintiff's complaint for failure to state a claim. *Hale v. Marsh*, 808 F.2d 616 (7th Cir. 1986). The court held that "[a] Title VII suit [cannot] be maintained for the sole purpose of obtaining an attorney's fee for the plaintiff's lawyer." *Id.* at 620 (citation omitted).

Lightfoot further claims that, notwithstanding *McLaughlin* and *Hale*, attorneys' fees are nevertheless appropriate in instances where a plaintiff prevails on a state claim pendent to an unsuccessful civil rights claim. *Milwe v. Cavuoto*, 653 F.2d 80, 84 (2d. Cir. 1981). He argues that this action presents just the circumstances that the Milwe court contemplated. I disagree. The *Milwe* court limited its holding to situations where " 'the plaintiff prevails on a wholly statutory, non-civil rights claims *pendent to a substantial constitutional claim*. . . .' " *Id.* (emphasis added) (quoting *Maher v. Gagne*, 448 U.S. 122 (1980). As I dismissed Lightfoot's ADEA claim before the commencement of trial, he lacked the requisite "substantial constitutional claim."

2. *Post-judgment Interest*

Lightfoot seeks to recover post-judgment interest from the date the verdict was rendered to the date of entry of judgment, pursuant to C.P.L.R. § 5002 (McKinney 1992), and from the date of entry of judgment forward, pursuant to 28 U.S.C. § 1961(a) and C.P.L.R. § 5003 (McKinney 1992).

Federal courts agree that post-judgment interest on a money judgment recovered in federal court is governed by 28 U.S.C. § 1961(a). *See, e.g., Fuchs v. Lifetime Doors, Inc.*, 939 F.2d 1275, 1280 (5th Cir. 1991); *Travelers Ins. Co. v. Transport Ins. Co.*, 846 F.2d 1048, 1053-54 (7th Cir. 1988); *Goldman v. Burch*, 778 F. Supp. 781 790 (S.D.N.Y. 1991).

The language of Section 1961(a) seems clear: "[i]nterest shall be allowed on any money judgment in a civil case recovered in a district court. . . . *Such interest shall be calculated from the date of the entry of the judgment*. . . . 28 U.S.C. § 1961(a) (emphasis added). Accordingly, Lightfoot is entitled to post-judgment interest from the date judgment was entered.

B. *Union Carbide's Motions*

The defendants move for a new trial on the grounds that the jury's verdict is contrary to the weight of the evidence; the

admission of improper evidence and prejudicial comments made by Lightfoot's attorney, Arthur Wisehart, tainted the jury; and the jury's award is excessive and unreasonable. In the alternative, the defendants argue that they are entitled to a new-trial an the issue of damages, or to a remittitur.

1. *Motion For a New Trial*

a. *Jury verdicts that are contrary to the weight of the evidence*

A motion for a new trial may be granted when the district court feels that " 'the jury has reached a seriously erroneous result or . . . the verdict is a miscarriage of justice . . . .' " *Song v. Ives Laboratories, Inc*, 957 F.2d 1041, 1047 (2d Cir. 1992) (citations omitted). In this case, although in my view the evidence presented by the plaintiff on his claim was at best equivocal. I cannot characterize the result as "seriously erroneous."

b. *Evidence that is improperly admitted*

Where evidence that prejudices the rights of a party has been improperly admitted, a court may order a new trial. *See, e.g., Logan v. Dayton Hudson Corp.*, 865 F.2d 789 (6th Cir. 1989). Here, the defendants argue that the jury was tainted by testimony that I erroneously admitted and by improper comments made by Mr. Wisehart in the jury's presence. Even accepting the defendants position regarding the admissibility of the evidence at issue and the propriety of Mr. Wisehart's comments, they do not amount to prejudice so extreme as to warrant a new trial.

2. *Defendants' Motion For a New Trial on Damages or a Remittitur*

The defendants' arguments in favor of a new trial on the issue of damages is unnecessary in light of the law with respect to excessive verdicts and remittitures. Based on the law, a remittitur is appropriate. Looking at New York law, the

standard spelled out in CPLR § 5501(c) is pretty well established as applicable to trial and appellate courts and reads in pertinent part that "an award is excessive if it deviates materially from what would be reasonable compensation." *See Prunty v. YMCA of Lockport Inc.*, 206 A.D.2d 911, 616 N.Y.S.2d 117 (4th Dep't 1994). In analyzing the issue in *Prunty*, the Fourth Department wrote "at least two of the Departments of the Appellate Division have ruled that the trial court may overturn a jury's award of damages in a negligence action where it deviates materially from what would be reasonable compensation . . . . We now adopt the same rule." *Prunty*, 206 A.D.2d at 911, 616 N.Y.S.2d at 118.

At least one Federal District Court has reached the same conclusion. *See Travellers Companies v. New York General Mechanical Inc.*, 1994 WL 584926 (W.D.N.Y. Oct. 24, 1994). The issue then is how to determine excessiveness. In a recent decision, Judge Leval concludes that the court must take into consideration verdicts in similar cases as one way to determine whether there is a material deviation:

> [i]n the face of so substantial a pattern of New York judgments communicating that New York courts find excessiveness in such cases at far lower levels, we believe it was error for the district court to conclude that the jury's $12 million award was within the range accepted by New York law.

Consorti v. Armstrong World Industries, 64 Fed.3d 781, ___ (2nd Cir. 1995). After a review of New York State Human Rights law verdicts dealing with age discrimination and other wrongdoing covered by the law, there seems little doubt that the verdict here was a material deviation from the norm. A number of New York courts have remitted damage awards in discrimination cases. *See, e.g., Quality Care, Inc. v. Rosa*, 599 N.Y.S.2d 65, 66 (2d Dep't 1993) ($10,000 award for compensatory damages in age discrimination case remitted to $5,000); *Pioneer Grour v. State Division of Human Rights*, 572 N.Y.S.2d 207, 208 (4th Dep't 1991) ($10,000 award for compensatory damages awarded to plaintiff who was unlaw-

fully discriminated against on basis of conviction of a crime remitted to $5,000); *Cosmos Forms, Ltd. v. State Division of Human Rights*, 541 N.Y.S.2d 50, 51 (2d Dep't 1989) ($35,000 award for compensatory damages for racial discrimination remitted to $5,000).

Similarly, the First Circuit, sitting in review of a Puerto Rican District Court's reduction of plaintiff's jury award for the pain and suffering incurred as a result of job loss from $150,000 to $37,500 found that the reduction was not unjustified. *See Sanchez v. Puerto Rico Oil Co.*, 37 F.3d 712, 724 (1st Cir. 1994).

In another recent Federal case, *Binder v. Long Island Lighting Company*, 847 F. Supp 1007 (E.D.N.Y. 1994), a $497,738 verdict for pain and suffering was reduced to $5,000. In an even more recent Title VII lawsuit, Judge Chin upheld an award on a far more unfortunate fact pattern than in the case at bar, that included $100,000 for pain and suffering. *Marfia v. Ozman*, 1995 WL 584677, *7 (S.D.N.Y. Sept. 15, 1995). In that case, the plaintiff was so distressed by his wrongful termination that he attempted suicide and was fortuitously stopped by his fifteen year old son. The plaintiff was then taken to a hospital where he was placed on suicide watch for two weeks. Nothing as compelling came to light here.

In the instant action, Lightfoot's compensatory damage verdict wax a material deviation not only from similar cases but also from the proof adduced at trial. Taken together with Judge Leval's decision in *Consorti*, the verdict must be reduced.

Plaintiff's damages are remitted from $750,000 to $75,000.

III. Conclusion

For the reasons set forth above, Lightfoot's motion for attorneys' fees is denied; the defendants' motion for a new trial is denied; the defendants' motion for a new trial on the issue of damages is denied; and the defendants' motion to

remit damages is granted in accordance with this Order and Opinion.

SO ORDERED.

New York, New York
Dated: October 24, 1995

/s/ HAROLD BAER, JR.
Harold Baer, Jr.
United States District Judge

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

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92 Civ. 6411

RICHARD HALL LIGHTFOOT,

Plaintiff,

—against—

UNION CARBIDE CORPORATION, A.W. LUTZ, PRESIDENT, INDUSTRIAL CHEMICALS DIVISION and W.E. SHACKELFORD, VICE PRESIDENT, INDUSTRIAL CHEMICALS DIVISION,

Defendants.

Before:

HON. HAROLD BAER, JR.,

District Judge.

APPEARANCES

WISEHART & KOCH
Attorneys for Plaintiff
ARTHUR M. WISEHART
MICHAEL H. PRINCE

MCDERMOTT, WILL & EMERY
Attorneys for Defendants
JOEL E. COHEN
NANCY I. SOLOMON

* * *

I don't expect that this case is going to produce any media attention, certainly not in the immediate future, but once again, the role of jurors is simply to assess the evidence, and the evidence is what you hear here, both testimony and exhibits and any stipulations that may be entered into-between the parties and that's it.

So if there is anything in the newspaper or on the radio or television, just put it down and turn it off, depending on what it is.

See you on Friday morning at 9:30. Please be prompt so that we can start on time. Have a good evening and a good day, and we will see you Friday.

(Jury excused)

THE COURT: While I have a court reporter, maybe it's a good time to read into the record what we had been talking about before we started.

I think this resolves all the questions that we have in front of us.

Defendants Union Carbide Corporation, A.W. Lutz and W.E. Shackelford, collectively the defendants, moved in limine to exclude the admission into evidence of certain testimony and exhibits that plaintiff, Richard Hall Lightfoot intends to offer into evidence at trial.

Similarly, Lightfoot moved in limine to exclude certain exhibits that defendants intended to offer.

The court ruled on these motions in its memorandum order, dated May 31, 1995, but reserved decision on the admissibility of evidence relating to pretermination damages and requested the parties to submit letter briefs addressing this issue.

The court further requested an explanation of the relevance of Plaintiff's Exhibits 29, 30 and 110 beyond their application to pretermination damages.

Additionally, the defendant requested of the Court by letter, dated June 7, 1995, to preclude Lightfoot from one, allowing Andrew Gluck to testify as to loss of earnings; and two, admitting plaintiff's special interrogatories at trial. I guess those really are what I mean as the verdict sheet.

After reviewing the parties letter briefs as well as the prior rulings of Judge Patterson, the Court in an effort to clarify and/or maybe better said restate its May 31 ruling, initially notes that Mr. Lightfoot is not entitled to damages for back pay order, an opinion dated May 12, '94 by Judge Patterson at page 12 reads in pertinent part as follows:

Summary judgment is granted in the defendant's favor in all causes of action as to Carbide's liability for back pay. Nor are they entitled to damages for front pay."

Again, Judge Patterson's opinion of July 28th, '94 at page 3, which reads in part, "Plaintiff waived his right to front pay when he declined Carbide's offer of reinstatement."

The Court, in consequence, concludes:

One, Lightfoot's pretermination discrimination damages claim is time-barred.

Lightfoot alleges that when he was promoted to business director in '88, he remained at grade 17 while Robert Kisker, already a business director at the time, was at grade 19. Consequently, any purported pay disparity claim arising from Lightfoot's grade 17 status after his '88 promotion conclude in '88.

Thus, because Lightfoot filed its EEOC charge and complaint in 1992, this claim is untimely, see 29 U.S.C., Section 626(d) (Claim for age discrimination is untimely if plaintiff files a charge with the EEOC more than 300 days after the alleged unlawful conduct occurred.) Murphy versus American Home Products Corp., 461 N.Y.S. 2d 232, 239. Three years statute of limitations for age discrimination claims is applicable. The Court acts under the New York State Human Rights Law.

I should note parenthetically in the robing room we discussed looking at this one more time, and we will.

Two, defendant's motion to preclude Lightfoot from offering into evidence is it Plaintiff's Exhibit's 29 and 30, documents prepared by Lightfoot containing salary comparisons, and Plaintiff's Exhibit 110 a document prepared by Lightfoot comparing his salary to Robert Kisker is denied.

Three, the court reserves decision on defendant's request to preclude Lightfoot from calling Andrew Gluck to testify.

With respect to plaintiff's verdict sheet, basically I reserve decision on that issue, because I heard nothing from the plaintiff, and I wondered whether there was anything that the plaintiff had to say in response.

If you do, I will be glad to listen. Yes

MR. WISEHART: Your Honor, I believe that has to do with compensatory damages, and the claim for compensatory damages is clarified in a letter that we sent to the Court today. It includes his claim for his personal injury, mental anguish and damage to reputation.

* * *

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

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92 Civ. 6411 (RPP)

RICHARD HALL LIGHTFOOT,

Plaintiff,

—against—

UNION CARBIDE CORPORATION, A.W. LUTZ, PRESIDENT, INDUSTRIAL CHEMICALS DIVISION and W.E. SHACKELFORD, VICE PRESIDENT, INDUSTRIAL CHEMICALS DIVISION,

Defendants.

OPINION AND ORDER

ROBERT P. PATTERSON JR., U.S.D.J.

Plaintiff moves pursuant to Rules 52(b) 59(e), 60 (b)(2) and 60(b)(6) of the Federal Rules of Civil Procedure to amend and modify this Court's Orders dated May 12, 1994 and July 28, 1994 by: (1) Vacating the grant of summary judgment and the dismissal of Count V of Plaintiff's Amended Complaint based on the Plaintiff's assignment of invention rights; and (2) Vacating the Court's decision that Plaintiff's damages for backpay are precluded by his failure to accept an unconditional offer of reinstatement.

Plaintiff argues that "newly discovered evidence" supports vacating the Court's previous dismissal of Count V of the

Amended Complaint (a claim of unjust enrichment based on the alleged expiration of his assignment of invention rights). Lightfoot Aff. dated August 11, 1994 ("Lightfoot Aff.") at ¶¶ 3-16. Plaintiff contends that because Defendant Union Carbide Corporation ("Carbide") executed a different agreement with another employee regarding the assignment of invention rights, material issues of fact are raised which are properly determined by the jury.[1] Lightfoot Aff. at ¶ 16. However, the execution by Carbide of a different agreement with another employee does not create any ambiguity in Plaintiff's agreement because, under New York law, "[i]f a contract is unambiguous, courts are required to give effect to the contract as written and may not consider extrinsic evidence to alter or interpret its meaning." *Consarc Corp. v. Marine Midland Bank, N.A.*, 996 F-2d 568, 573 (2d Cir. 1993) (citations omitted). Since the Plaintiff's assignment of invention rights to Carbide is not ambiguous, this "new evidence" provides no ground for vacating the dismissal of Count V of the Amended Complaint.

The other basis Plaintiff offers for amending the Court's previous orders consists of Judge McKenna's decision in *Ladson v. Ulltra as Parking Corp.*, 853 F. Supp. 699 (S.D.N.Y. May 10, 1994). Lightfoot Aff. at ¶ 17. Judge McKenna noted in Ladson that "[i]t is for the trier of fact to determine the unconditionally of an offer and the reasonableness of a refusal." 853 F. Supp. at 705 (citing *Pierce v. F.R. Tripler Co.*, 955 F.2d 820 [2d Cir. 19921). In *Ladson* Judge McKenna ruled that "special circumstances" existed which prevented the tolling of backpay liability based on undisputed threats of physical violence toward the plaintiff and a finding that the defendants did not offer plaintiff the job previously denied as

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[1] James B. White, Plaintiff's former supervisor, executed an agreement with Carbide in 1991 which stated that his assignment obligations "shall survive termination of [his] employment for any reason." Lightfoot Aff. Ex. A. Lightfoot's agreement with Carbide contained no such provision. *Id.* at Ex. B. 2.

required by *Ford Motor Co. v. EEOC*, 458 U.S. 219 (1982). 853 F. Supp. at 705-06.

This Court also cited *Pierce* on page 2 of its July 28, 1994 Opinion and Order for the holding that "an unconditional offer of a job substantially similar to the one denied the plaintiff, may, as a matter of law, toll back pay. . . ." 955 F.2d at 830. No "special circumstances" exist in the instant case which would preclude the tolling of backpay liability, and therefore Judge McKenna's decision *Ladson* presents no basis for amending the Court's previous orders.[2]

For the reasons described above, Plaintiff's motion is denied in its entirety. As previously ordered, the parties will prepare and file a pretrial order by February 7, 1994, and be ready for trial on February 14, 1994.

IT IS SO ORDERED.

Dated: New York, New York
January 23, 1995

/s/ ROBERT P. PATTERSON, JR.
ROBERT P. PATTERSON, JR.
U.S.D.J.

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[2] Plaintiff contends that a psychiatric evaluation by Dr. Stanley L. Portnow dated August 20, 1992 (the "Portnow Evaluation") establishes that his rejection of reinstatement was reasonable because of changed staffing patterns in the department where he was offered reinstatement. Lightfoot Aff. at ¶¶ 18-27 and Ex. C. The Portnow Evaluation, in the possession of Plaintiff's counsel for almost two years prior to the Court's Order and Opinion of July 28, 1994, provides no support for revisiting the Court's decision that Plaintiff's damages for backpay are precluded because of his failure to accept an unconditional offer of reinstatement.

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

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92 Civ. 6411 (RPP)

RICHARD HALL LIGHTFOOT,

Plaintiff,

—against—

UNION CARBIDE CORPORATION, A.W. LUTZ, PRESIDENT, INDUSTRIAL CHEMICALS DIVISION and W.E. SHACKELFORD, VICE PRESIDENT, INDUSTRIAL CHEMICAL DIVISION

Defendants.

ORDER AND OPINION

ROBERT P. PATTERSON, JR., U.S.D.J.

This is a motion made pursuant to local rule 3(j) by plaintiff Richard Lightfoot for reargument of the Order and Opinion dated May 12, 1994 granting Defendants, Union Carbide, A.W. Lutz and W.E. Shackelford partial summary judgment. This motion is denied because plaintiff has raised no new factual issues or controlling legal decisions which had been overlooked by the Court in its May 12, 1994 Order and Opinion.

I. SEVERANCE PAY

Plaintiff argues that the Court improperly decided that plaintiff's backpay must be reduced by the amount that he received as severance. Such a deduction is improper according to plaintiff because severance pay is a fringe benefit earned before termination that cannot properly be considered when determining the amount of backpay that plaintiff is entitled. However, plaintiff fails to cite to any controlling authority that this Court overlooked. *James v. Fleet/Norstar Financial Group*, 992 F.2d 463 (2d Cir. 1993), cited by plaintiff, concerns whether severance pay can be considered an ERISA benefit and is not applicable to this case. Moreover, courts have routinely reduced backpay awards by the amount a former employee received in severance. *See Munnelly v. Memorial Sloan Kettering Cancer Center*, 741 F. Supp. 60 (S.D.N.Y. 1990); *Sinclair v. Insurance Co. of North America*, 609 F. Supp. 397 (E.D. Pa. 1984), *aff'd* 782 F.2d 1029 (3d Cir. 1986); *see also Sims v. Madame Paulette Dry Cleaners*, 633 F. Supp. 224 (S.D.N.Y. 1986) (offset damages by plaintiff's unemployment benefits); *Meschino v. International Tel. & Tel. Corp.*, 661 F. Supp 254 (S.D.N.Y. 1987) (discriminatory employer allowed to deduct pension benefits received by plaintiff from ADEA award). Thus reargument, on the issue of the deduction of plaintiff's severance pay from any backpay award is not warranted.

II. OFFER OF REINSTATEMENT

Plaintiff argues that the Court should vacate its decision that plaintiff's damages for backpay are precluded because of plaintiff's failure to accept an unconditional offer of reinstatement. Citing *Pierce v. F.R. Tripler & Co.*, 955 F.2d 820 (2d Cir. 1992), plaintiff argues that a genuine issue of fact exists as to whether the offer or reinstatement was unconditional. However, the Second Circuit in *Pierce* held that "an unconditional offer of a job substantially similar to the one

denied the plaintiff, may, as a matter of law, toll back pay, . . ." *Id.* at 830. As discussed in the May 12, 1994 Order and Opinion the offer of reinstatement was unconditional and plaintiff has failed to raise a genuine issue of material fact as to whether the offer of reinstatement was unconditional. Plaintiff has cited nothing about the offer of reinstatement which would make it a conditional offer. The fact that layoffs had changed the composition of his work group, that Mr. Shackelford would still be his superior and that Carbide required an answer within three weeks do not make the offer of plaintiff's job back a conditional offer. Order and Opinion at pp. 9-12. Accordingly, reargument of the effect of the unconditional offer of reinstatement is denied.

III. CLARIFICATIONS

Plaintiff argues that the May 12, 1994 Order and Opinion must be clarified because it does not state 1) that plaintiff is entitled to front pay; 2) that plaintiff is entitled to compensatory damages under the New York State Human Rights Law; and 3) because footnote three of the Order and Opinion must be corrected.

In the May 12, 1994 Order and Opinion the Court stated that plaintiff could "not recover damages for lost wages because he continued to receive full pay as a severance benefit after he was offered his old job back." Order and Opinion at 12. Front pay may be offered as a remedy in appropriate cases where reinstatement is not a suitable remedy. *Whittlesey v. Union Carbide Corp.*, 742 F.2d 724 (2d Cir. 1984). In this case plaintiff waived his right to front pay when he declined Carbide's offer of reinstatement. *See Ford Motor Co. v. E.E.O.C.*, 458 U.S. 219, 231-32 (1982); *see also Dominic v. Consolidated Edison Co. of New York, Inc.*, 822 F.2d 1249, 1258 (2d Cir. 1987) (plaintiff's failure to mitigate damages, by refusing substantially equivalent job, forecloses award of frontpay); *Reilly v. Cisneros*, 835 F. Supp. 96, 99 (W.D.N.Y. 1993) ("[i]f a plaintiff rejects an offer of substantially simi-

lar employment, he loses his right to pay from and after the time of such rejection"); *accord Rodgers v. Western Southern Life Ins, Co.*, 12 F.3d 668, 678 (7th Cir. 1993) (court refused to award front pay where plaintiff-employee declined offer of reinstatement).

Plaintiff also argues that footnote 12 of the Court's Order and Opinion should be clarified because it does not state that plaintiff may be entitled to compensatory damages under the New York State Human Rights Law. N.Y. Exec. Law § 296 *et seq*. The footnote does not indicate anything to the contrary and does not need to be clarified. Plaintiff's contention that the statement in footnote 3 that "all reduction in force programs force employees to leave a company" needs to be corrected is similarly without merit. The reduction of force program to which the Court refers was not voluntary and plaintiff agrees that his cessation of employment pursuant to the reduction in force was not voluntary. To the extent that clarification is required the phrase "all reduction in force programs" is hereby changed to read "all non-voluntary reduction in force programs."

For the foregoing reasons plaintiff's motion for reargument is denied. The parties will appear before the Court for a pretrial conference on August 11, 1994 at 9 a.m. in Room 302.

IT IS SO ORDERED.

Dated: New York, New York
July 28, 1994

/s/ ROBERT P. PATTERSON, JR.
Robert P. Patterson, Jr.
U.S.D.J.

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

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92 Civ. 6411 (RPP)

RICHARD HALL LIGHTFOOT,

Plaintiff,

—v—

UNION CARBIDE CORPORATION, A.W. LUTZ, PRESIDENT, INDUSTRIAL CHEMICALS DIVISION and W.E. SHACKELFORD, VICE PRESIDENT, INDUSTRIAL CHEMICAL DIVISION,

Defendants.

APPEARANCES

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ORDER AND OPINION

ROBERT P. PATTERSON, JR., U.S.D.J.

Defendants, Union Carbide, A.W. Lutz and W.E. Shackelford move for an order pursuant to Fed. R. Civ. P. 56(b) granting summary judgment to defendants, dismissing plaintiff's amended complaint which contains seven counts and awarding defendants attorneys' fees and costs. Plaintiff, Richard Lightfoot, moves for an order granting partial summary judgment for plaintiff on Counts I, II, III and V of his amended complaint. Plaintiff also moves to strike the affidavit of Joel E. Cohen, Esq. sworn to July 9, 1993 and a letter dated December 3, 1992 from the record, for further discovery pursuant to Fed. R. Civ. P. 56(f), for sanctions against defendants pursuant to Fed. R. Civ. P. 11, and for an award of attorneys' fee and costs in plaintiff's favor. Each of these requests will be discussed in turn.

I. BACKGROUND FACTS

In 1959, Plaintiff Richard Lightfoot accepted a position at Union Carbide Corporation ("Carbide") as a Chemical Engineer. Shortly after beginning his employment with Carbide plaintiff signed a Memorandum of Employee's Agreement. In the Agreement plaintiff assigned to Carbide all rights to any invention in which he was involved during the course of his

employment. In 1968, plaintiff was transferred to Carbide's New York City headquarters. In 1980, plaintiff was relocated from Carbide's New York City office to Carbide's new headquarters in Danbury, Connecticut. He continued to reside in New York City. In 1986, Plaintiff signed a second Memorandum of Employee's Agreement assigning Carbide his rights to his inventions. Wisehart Aff. submitted pursuant to local rule 3(g), at ¶¶ 1, 2, 4, 6.

In the 1980's, plaintiff held a variety of positions including Special Projects Manager and Marketing Manager for Surfactants. *Id.* at ¶ 5. On April 27, 1992, plaintiff was terminated from Carbide as part of a reduction in force program. He rejected the enhanced severance benefits offered by the program and instead received full pay as severance until February 1993. On December 3, 1992, Carbide made an offer to reinstate plaintiff to his former position; plaintiff rejected this offer. Cohen Aff., Exhs. G & H. In February 1993, plaintiff accepted a position with CRI, Inc. a consulting firm in the Chemical industry. *Id.* at ¶¶ 12, 14-16.

II. APPLICABLE LEGAL STANDARD

Summary judgment is appropriate if the evidence offered demonstrates that there is no genuine issue as to any material fact and the moving party is entitled to judgment as a matter of law. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242 (1986). The burden rests on the moving party to demonstrate the absence of a genuine issue of material fact, *Adickes v. S.H. Kress & Co.*, 398 U.S. 144, 157 (1970), and the Court must view the facts in the light most favorable to the non-moving party. *United States v. Diebold, Inc.*, 369 U.S. 654, 655 (1962).

III. PLAINTIFF'S NEW YORK STATE AND FEDERAL AGE DISCRIMINATION CLAIMS

Defendants contend that they should be granted summary judgment as to Counts I and III of the amended complaint, plaintiff's federal and New York State age discrimination claims, because plaintiff cannot meet his burden of showing

that age was a determinative factor in his dismissal.[1] In order to prove discrimination based on age "[t]he plaintiff has the burden of proving that 'age was the 'determining factor' in his discharge in the sense that, 'but for' his employer's motive to discriminate against him because of age, he would not have been discharged.' " *Pena v. Battleboro Retreat*, 702 F.2d 322, 323 (2d Cir. 1983) (citation omitted). Defendants rely on plaintiff's deposition testimony in which he ascribed his termination to the jealousy, self-interest and competitive attitude of his immediate supervisor to support their motion for summary judgment.

Plaintiff urges utilization of the *McDonnell Douglas*[2] analysis of the evidence:

> In order to establish a prima facie case of termination of employment in violation of the ADEA, a plaintiff must show (1) that he was within the protected age group, (2) that he was qualified for the job, (3) that he was discharged, and (4) that the discharge occurred under circumstances giving rise to an inference of age discrimination.

Stetson v. NYNEX Service Co., 995 F.2d 355, 359 (2d Cir. 1993). "If a prima facie case is established, the employer must offer a legitimate, nondiscriminatory reason for its actions." *Spence v. Maryland Casualty Co.*, 995 F.2d 1147, 1155 (2d Cir. 1993). If the employer presents such a reason the burden is on the plaintiff to show that the proffered reason was pretext for discrimination. *Id.*

Under the *McDonnell Douglas* test Lightfoot has established the first three elements of a prima facie case because he: 1) was in the protected age group, 2) was qualified for the job he held and 3) was discharged.

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[1] Plaintiff's age discrimination claim under New York Executive Law § 239 *et seq.* is governed by the same standard as his ADEA claim, 29 U.S.C. § 623 *et seq. See Spence v. Maryland Casualty Co.*, 995 F.2d 1147, 1158 (2d Cir. 1993).

[2] *McDonnell Douglas Corp. v. Green*, 411 U.S. 792 (1973).

Defendants and plaintiff dispute whether the evidence shows that plaintiff's discharge occurred under circumstances that give rise to an inference of discrimination. Plaintiff was discharged as a result of a reduction in force at Carbide under a program called the "Enhanced Separation Program."[3] To effectuate this reduction of force supervisors at Carbide "forced-ranked" employees within a group to determine which employee should be terminated. The "Forced-ranking" system involved weighing the following factors: ability, effectiveness, versatility, value to continuing business operation, uniqueness, company service and reassignment potential. In plaintiff's case it was applied to a group of 13 employees of which Lightfoot was the oldest. Lightfoot Aff. in Opposition to Summary Judgment, Exhs. E and I. Plaintiff's main contention is that a report on the forced-ranking session in which Carbide made the decision to terminate him shows that age played a factor in his termination because the document contains the dates of birth of the employees forced-ranked and because plaintiff, the oldest person ranked, was terminated rather than a person under 40 who received an equal ranking. Lightfoot Aff. in Opposition to Summary Judgment, Exh. E. Plaintiff also bases his argument on a written comment and a non-verbal response (a look) by Mr. Shackelford, his superior, when plaintiff informed him that plaintiff intended to work until age 70. Lightfoot Aff. in Opposition to Summary Judgment, Exh. C.[4] The comment was made two years before

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[3] Plaintiff also argues in his cross-motion that partial summary judgment should be granted in his favor on the age discrimination claim because defendants failed to deny that the Enhanced Separation Program adopted by Carbide "has a coercive purpose and effect. Older employees who did not accept the separation package were force to leave the company in any event." Amended Complaint, ¶ 149. This point is without merit since all reduction in force programs force employees to leave a company.

[4] In a written evaluation of plaintiff's work in 1989, Shackelford wrote that:

> Dick [plaintiff] wants to work until he is 70 and wants to know how he can maximize his contributions during the next 15 years! I suggested his two areas of greatest demonstrated strength were

plaintiff was terminated and on its face does not give rise to an inference of discrimination based on age. *See Moore v. Eli Lilly & Co.*, 990 F.2d 812, 818 (5th Cir. 1993), *cert. denied*, 114 S.Ct. 467 (1993) (supervisor's inquiry into employee's retirement plans after learning employee's age did not represent a discriminatory intent, but was a reasonable inquiry regarding employee's longevity). The look by Shackelford could be open to various interpretations.

Since plaintiff was the oldest employee, plaintiff's termination due to the forced-ranking procedure instead of an equally ranked younger employee gives rise to an inference of discrimination based on age. Here, however, plaintiff testified expansively during his deposition as to his conclusion that Mr. Shackelford's self-interest and competitiveness with plaintiff were the cause of plaintiff's termination from Carbide. Cohen Aff., Exh. C, Lightfoot Dep. at 122-25, 166-170. Plaintiff attempts to rebut defendants' use of his deposition testimony by directing the Court to other portions of his deposition testimony in which he stated that the treatment he received at Carbide vas due to age discrimination, and that he thought Mr. Shackelford was discriminating against him on the basis of age.[5] Lightfoot Aff. in Opposition to Summary Judgment, Exh. L, pp. 22-26, 163. Both excerpts are conclusions of plaintiff reached after his discharge, as is the plain-

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> in management of product safety and an incredible feel for tactical dynamics—ie, a super tactical product/ market manager. At this point this is the direction I would recommend for him.

Lightfoot Aff. in Opposition, Exh. C.

[5] Plaintiff also seeks to substantiate his claim of age discrimination by citing to his moving affidavit which merely states conclusory allegations of age discrimination. Defendants object to statements in Lightfoot's affidavit such as "[b]ias against older employees was (and is) a part of the permanent corporate psyche of Union Carbide Corporation . . ." Aff. at ¶60. Defendant correctly states that to the extent such statements are inconsistent with plaintiff's deposition testimony they must be disregarded because they do not create genuine issues of material fact. *See Trans-Orient Marine Corp. v. Star Trading & Marine, Inc.*, 925 F.2d 566, 572 (2d Cir. 1991); *Douglas v. Weil, Gotshal & Manges*, 1993 WL 364572 (S.D.N.Y. 1993).

tiff's testimony about Shackelford's self-interest and competitiveness.

Under these circumstances, where plaintiff's deposition testimony states more than one possible motivation for his employer's decision to terminate him, plaintiff's complaint must be examined as arising out of mixed motivation and *Price Waterhouse v. Hopkins*, 109 S.Ct. 1775 (1989) applies. In *Price Waterhouse*, the Supreme Court held that:

> An employer may not . . . prevail in a mixed-motives case by offering a legitimate and sufficient reason for its decision if that reason did not motivate it at the time of the decision. . . . The employer instead must show that its legitimate reason, standing alone, would have induced it to make the same decision.

Id. at 1791-92.

In this case Carbide's papers fail to set forth a legitimate and sufficient reason for its decision to terminate plaintiff, instead defendants rely on plaintiff's conclusory statements as to Shackelford's self-interest and competitiveness. Thus Carbide has failed to show that its legitimate reasons for terminating plaintiff standing alone would have induced it to make the decision to terminate plaintiff. Accordingly, summary judgment is inappropriate because an inference of age discrimination has been raised by the termination of plaintiff, the oldest member of the group of employees evaluated, rather than the equally-ranked younger employee in the group. Accordingly, genuine issues of material fact remain regarding Carbide's motives for terminating plaintiff. Defendants' motion for summary judgment on plaintiff's ADEA and New York State Human Rights claims is denied.[6]

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[6] Plaintiff moves for summary judgment on his age discrimination claim based on the fact that defendants did not verify their answer in response to plaintiff's verified complaint in violation of New York Civil Practice Law and Rule § 3016(f). However, since this action was brought in federal court "the Federal Rules of Civil Procedure 'govern the mode of proceedings in federal court . . . .' " *Harbor Seafood, Inc. v. June Foods, Inc.*, 1987 WL 15275 (E.D.N.Y. 1987) (denying plaintiff's motion for summary judgment predicated upon defendant's failure to comply

IV. THE LETTER OF REINSTATEMENT

In a December 3, 1992 letter to plaintiff Mr. Shackelford of Carbide made an unconditional offer to reinstate plaintiff to his prior position as market manager. Cohen Aff., Exh. G. Plaintiff responded to the letter through his counsel. Cohen Aff., Exh. H. In the response letter and in his motion papers plaintiff contends that the letter was an improper violation of Disciplinary Rule 7-104(a)(1) and that it should be stricken from the record pursuant to Fed. R. Evid. 408 because it was an offer of compromise.

In *Ford Motor Co. v. E.E.O.C.*, 458 U.S. 219, 241 (1982), the Supreme Court held that "absent special circumstance, the rejection of an employer's unconditional job offer ends the accrual of potential backpay liability." The letter in this case was sent by Mr. Shackelford on Carbide letterhead explaining that because another marketing manager had resigned Carbide was offering Mr. Lightfoot his old job back. The letter also stated that *"[t]his offer is unconditional."* Because plaintiff had received full pay as severance and continued to receive such pay after he received the offer Carbide contends that plaintiff is entitled to no backpay.

Plaintiff argues that the letter is "bogus" and is inadmissible evidence. Plaintiff's first objection is that the letter was sent directly to Mr. Lightfoot at a time when he was represented by counsel in violation of DR 7-104(a)(1).[7] Although the letter was not sent by defendant's counsel to Mr. Lightfoot, plaintiff contends that "[t]he contents of the Shackelford letter are such as to indicate that it must have been sent with

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with CPLR § 3016(f) in federal diversity action) (citing *Granny Goose Foods, Inc. v. Brotherhood of Teamsters*, 415 U.S. 423, 438 (1974).

[7] DR 7-104(a)(1) states:

> During the course of the representation of a client a lawyer shall not:
>
> (1) Communicate or cause another to communicate on the subject of the representation with a party the lawyer knows to be represented by a lawyer in that matter unless the lawyer has the prior consent of the lawyer representing such other party or is authorized by law to do so.

the prior knowledge or consent of counsel for the defendants . . . ." Pl. Mem. in Support of Summary Judgment, p. 10. Despite plaintiff's presumption the evidence does not show that any disciplinary rule has been broken. At his deposition Mr. Shackelford testified that it was his idea to offer Mr. Lightfoot his job back after another employee decided to leave Carbide. Shackelford then conferred with Mr. Lawlor, Carbide's inside counsel, about whether he could offer Mr. Lightfoot the job and showed Lawlor a draft of the letter. Shackelford also testified that the language of the letter, particularly the term "unconditional," came from him. Shackelford Dep., pp. 26-46. Thus the November 1992 letter was not a violation of DR 7-104(a) because no evidence has been elicited that an attorney sent the letter or caused the letter to be sent.[8]

Plaintiff argues that the letter was an offer of compromise and is inadmissible under Fed. R. Evid. 408. However, plaintiff does not show any circumstances which would make the letter an offer of compromise and the letter on its face is unconditional and does not require Lightfoot to compromise his claims against the defendants. Although plaintiff's counsel's response to the offer by Carbide refers to settlement negotiations, there is no evidence that the offer letter was sent as part of those settlement negotiations; rather Mr. Shackelford testified that the idea to send the letter stemmed from a vacancy in his department and his thought that plaintiff could fill the position. Moreover, by the terms of the letter plaintiff was not required to drop his claims against defendants. Thus Fed. R. Evid. 408 is not a bar to the admission of the letter as an offer of compromise.

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[8] Plaintiff also asks the Court to strike the affidavit of Mr. Cohen, the defendants' attorney, because it is not based on personal knowledge. There is no basis upon which to strike Mr. Cohen's affidavit because it merely serves as a roadmap for the documentary evidence and deposition testimony produced during this litigation. *See Spence v. Maryland Casualty Co.*, 803 F. Supp. 649, 664 (W.D.N.Y. 1992), *aff'd*, 995 F. 2d 1147 (2d Cir. 1993); *Maier-Schule GMC, Inc. v. General Motors Corp.*, 780 F. Supp. 984, 988 (W.D.N.Y. 1991).

Plaintiff also contends that the letter does not end Carbide's backpay liability because the offer was not unconditional since it was predicated on Mr. Lightfoot having to accept or reject the letter by a certain date, it did not offer plaintiff increased benefits to which he claims he was entitled and because the job he was offered could not be the same because most of the people he worked with were no longer in the group. Although these may be deemed conditions, an offer for reinstatement is considered "unconditional" if the job offered is substantially equivalent to the position that the employee claims to have been wrongfully terminated from and if the employee does not have to drop his legal claims against the employer. *See Ford*, 458 U.S. at 232. The letter sent by Carbide to Lightfoot is an unconditional offer of reinstatement and serves to cut off Carbide's backpay liability. *See Ford*. Although plaintiff may pursue his federal and New York State age discrimination claims he cannot recover damages for lost wages because he continued to receive full pay as a severance benefit after he was offered his job back. Summary judgment is granted in the defendants' favor in all causes of actions as to Carbide's liability for backpay.

V. NEW YORK CITY HUMAN RIGHTS LAW CLAIM

Defendants contend that plaintiff's claim under the New York City Human Rights law must be dismissed because plaintiff has failed to allege that his complaint was filed with the New York City Commission on Human Rights or with the New York City Corporation Counsel prior to the commencement of this action and because there are no allegations that the defendants intentionally discriminated against him within the boundaries of New York City. Plaintiff argues that the New York City Human Rights Law should extend to his claim because he was living in New York City and performed work at home occasionally and because Carbide still has some offices in New York City. Plaintiff also alleges that the Early Separation Program adopted by Carbide was approved at a meeting in New York City. Its impact on him, however, occurred while he was employed in Connecticut. Lightfoot Aff. in Opposition, ¶¶ 265-266, 269-274.

Although plaintiff argues that summary judgment should not be granted in defendant's favor because he has "duly" filed his complaint with the New York City Commission on Human Rights or the New York City Corporation Counsel, he has not testified that he filed his complaint prior to commencing this civil action or provided the Court with an exhibit to support his claim that his complaint was filed prior to commencing this civil action as required under the City Law. Lightfoot Aff. in Opposition to Summary Judgment at ¶ 267; *see* New York City Administrative Code § 8-502. Moreover, plaintiff does not allege that defendants intentionally discriminated against him within the boundaries of New York City and the jurisdiction of the New York City Human Rights Commission does not extend to Connecticut. *See* N.Y. Gen. Mun. Law § 239-s; N.Y.C. Admin. Code § 2-201. Accordingly, summary judgment is granted in the defendants' favor on plaintiff's New York City Human Rights claim and Count II of plaintiff's amended complaint is dismissed.

VI. PLAINTIFF'S ERISA CLAIM

Section 510 of the Employee Retirement Income Security Act ("ERISA"), 29 U.S.C. § 1140, provides that "[i]t shall be unlawful for any person to discharge . . . a participant or beneficiary . . . for the purpose of interfering with the attainment of any right to which such participant may become entitled under the plan . . . ."

Plaintiff maintains that he has an ERISA claim against Carbide because there is a causal link between his discharge and the diminution of his pension benefits. Plaintiff has presented no evidence to show that his discharge was motivated by Carbide's desire to lessen his pension benefits. Plaintiff cites *Turner v. Schering-Plough Corp.*, 901 F.2d 335 (3d Cir. 1990), for the proposition that the reduction of benefits resulting from plaintiff's termination could reasonably be viewed as a motivating factor in his discriminatory treatment. However, in *Turner*, the Third Circuit did not find that a plaintiff's mere allegations that his benefits were reduced to be suffi-

cient evidence to support a claim for discrimination under ERISA. In fact, the Third Circuit stated:

> As we have noted, Turner's discharge did not deprive him of his pension. All Turner has shown is that his termination deprived him of the opportunity to accrue additional benefits through more years of employment. This kind of deprivation occurs whenever an ERISA employer discharges an employee and is not alone probative of an intent to interfere with pension rights.

Id. at 348. The court in *Turner* held that under the circumstances surrounding Turner's discharge Turner had not established a *prima facie* case of discrimination based on ERISA and that summary judgment was properly granted to the employer. Similarly, here plaintiff has only shown that his potential pension benefits were diminished by his termination, and although the court in *Turner* acknowledged that a plaintiff might be able to establish a prima facie case of ERISA discrimination if the reduction of pension benefits were substantial this is not such a case. *See Dister v. Continental Group, Inc.*, 859 F.2d 1108, 1117 n.1 (2d Cir. 1988) ("[the Second Circuit's opinions] cannot be read to mean that mere cost savings and proximity to benefits are sufficient *per se* to create a genuine issue of fact requiring a trial."). Lightfoot's pension benefits have already vested and although his discharge resulted in his being unable to accrue further benefits, plaintiff has not presented any evidence that this was a motivating factor in his discharge. Indeed he was offered the opportunity to accrue additional benefits and chose not to do so when he rejected Shackelford's offer of reinstatement. Accordingly, summary judgment on plaintiff's ERISA claim is granted in defendants' favor and Count VI of the amended complaint is dismissed.[9]

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[9] Plaintiff argues that summary judgment in his favor on his ERISA claim should be granted because defendants failed to answer ¶49 of the Amended Verified Complaint and have "conceded that the separation program had a coercive purpose and effect . . . ." Pl. Brief in opposition, p. 13. After reviewing the Answer it is clear that the failure to deny paragraph 49 was a clerical oversight created by a page break.

VII. BREACH OF CONTRACT CLAIM

Plaintiff contends that Connecticut law should be applied to his breach of contract claim because under New York law the law of the state where the contract is to be performed applies, and in this case Carbide's office was located in Connecticut. *See Bergstein v. Jordache Enterprises, Inc.*, 767 F. Supp. 535, 541 (S.D.N.Y. 1991); *Babcock v. Jackson*, 240 N.Y.S.2d 743 (1963). Defendants argue that plaintiff's claim fails under either Connecticut or New York law.

Plaintiff maintains that the contract he entered into with Carbide provided that he could be terminated only if he failed to perform adequately. However, the two Memorandums of Employee's Agreement that he signed with Carbide expressly provide that: "[t]his agreement does not, of course, bind either party to any specific period of employment." Cohen Aff., Exh. D and E. Plaintiff maintains that he had a lifetime employment agreement with Carbide but does not give specifics, rather stating that Carbide represented to him that he had a life-time position with the company. Lightfoot Aff. at ¶¶ 239-247. Under Connecticut law these allegations are insufficient to defeat a summary judgment motion when employment was at will.

"In Connecticut, an implied employment contract may arise under the doctrine of promissory estoppel, where injustice to a promise who has acted in reliance can be avoided only by enforcement of 'a clear and definite promise which a promisor could reasonably have expected to induce reliance.' " *Manning v. Cigna Corp.*, 807 F. Supp. 889, 895 (D.Conn. 1991) (citation omitted). In *Manning*, the court granted summary judgment to the employer on the plaintiff's implied contract claim because the plaintiff could not provide any evidence "to support his unilateral understanding of an implied employment contract on the issue of discharge." *Id.*

Cohen Reply Aff., ¶5. Because plaintiff has suffered no prejudice due to this oversight, defendants' Answer is considered to have denied ¶49 of plaintiff's Amended Verified Complaint. *See Jewish Nat'l Fund, Inc. v. Garland*, 1985 WL 163 (S.D.N.Y. 1985); *Pelch v. Peninsula Gen. Hosp.*, 340 N.Y.S.2d 388 (2d Dept. 1973).

at 896. *See Anderson v. Coca Cola Bottling Co. of New York, Inc.*, 772 F. Supp. 77 (D. Conn. 1991); *Johnson v. Carpenter Technology Corp.*, 723 F. Supp. 180 (D. Conn. 1989). In this case plaintiff does not point to any clear and definite promise which was made to him by Carbide. The lack of a clear and definite promise of lifetime employment combined with the two Memorandums of Employee's Agreement which plaintiff signed support the conclusion that plaintiff's employment was terminable at will. New York law does not differ. *See Cucchi v. New York City Off-Track Betting Corp.*, 818 F. Supp. 647, 653 (S.D.N.Y. 1993); *Sabatey v. Sterling Drug, Inc.*, 514 N.Y.S.2d 209 (1987). Accordingly, Count IV of the amended complaint is dismissed and summary judgment as to plaintiff's implied contract claim is granted in the defendants' favor.

VIII. QUANTUM MERIT

In his complaint plaintiff alleges that he has a claim in quantum meruit against Carbide because of his participation in the making of inventions at Carbide. Defendants contend that plaintiff's claim for quantum meruit fails as a matter of law.

> In order to make out a claim in *quantum meruit*, the plaintiff must establish performance of his services in good faith, acceptance of the services by the persons to whom such services were rendered, expectation of compensation, and the reasonable value of such services.

Paper Corp. of U.S. v. Schoeller Technical Papers, Inc., 773 F. Supp. 632, 640 (S.D.N.Y. 1991) (citing *Martin H. Bauman Assocs. Inc. v. H & M Int'l Transport.*, 567 N.Y.S.2d 404, 404 (1st Dept 1991)).

Defendants contend that plaintiff has not established that he had a reasonable expectation of compensation for his role in developing the inventions. Plaintiff argues that he has shown as required by New York precedent that the services he provided by participating in the inventions were "so distinct from the duties of his employment and of such a nature that it would be unreasonable for the employer to assume that they

were rendered without expectation of further pay." *Robinson v. Munn*, 238 N.Y. 40, 43 (1924).[10] However, during his deposition plaintiff testified that:

> It was everything that the marketing manager's job was to do. I mean our whole role . . . . Our reason for existence, reason for this huge—not just me but there was 100 odd marketing people, maybe 10 marketing managers, probably 300 R&D involved in this effort, the whole reason was to develop new products, new product lines.

Lightfoot Dep. at 97.

Mr. Lightfoot also testified that although his job included the development of new products he would not develop all new products, just those related to surfactants, the group for which he was a marketing manager.

> My job was new products and surfactants and I was just bending my talents to it the best way I knew to make the best for the company but not outside surfactants. Now, I don't recall any particular product coming out that was outside surfactants. I will say this, if we came up with an idea that was outside surfactants, again, I have no recollection of that, I would have made it my duty, my business to get the right people somewhere within Carbide both R&D and commercial people to alert them of the idea. I wouldn't do more than alert them of the idea.

Lightfoot Dep. at 75.

In an August 26, 1992 sworn declaration to the United States Patent and Trademark Office regarding one of the inventions at issue, plaintiff asserted:

> That I was not employed or assigned to perform research, development, or exploration work, but the invention is nevertheless related to the work or duties I was employed or assigned to perform;

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[10] Plaintiff does not argue that any law other than New York law applies to his quantum meruit claim.

> That the invention was made during working hours and with the use of the facilities, equipment, materials, funds, information and services of Union Carbide Chemicals and Plastics Company, Inc.;

Cohen Aff., Exh. F, p. 2. This declaration by plaintiff, the provisions of the two Memorandums of Employee's Agreement in which plaintiff agreed to assign all his inventions to Carbide and his deposition testimony all establish that plaintiff's participation in the development of the inventions was not so far outside of the scope of his employment so that Carbide would have to provide extra compensation for those services.

Although plaintiff claims that Carbide should have known that the work plaintiff performed in terms of the inventions entitled him to additional compensation, plaintiff has submitted no evidence that he was promised or asked for anything more than consideration for a promotion.[11] Summary judgment in defendants' favor is granted with regards to plaintiff's quantum meruit claim based on his contributions to inventions and new products at Carbide.

IX. UNJUST ENRICHMENT

Unjust enrichment is a quasi-contractual claim which allows a party to recover to prevent another party from being unjustly enriched at his expense. *Bradkin v. Leverton*, 309 N.Y.S.2d 192, 196 (1970); *Connecticut Nat'l Bank v. Chapman*, 216 A.2d 814, 817-18. Count VI of plaintiff's verified amended complaint asserts a claim for unjust enrichment due to plaintiff's participation in the inventions. Defendants argue that plaintiff's claim for unjust enrichment fails as a matter of law because Carbide was entitled to any benefits that Carbide received from plaintiff's participation in the inventions by virtue of the two Memorandums of Employee's Agreement which plaintiff signed.

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[11] His March 1990 performance evaluation stated that consideration for a promotion required more than for plaintiff to develop new products, it also required plaintiff to improve his interpersonal skills. Lightfoot Aff. in Opposition, Exh. C.

In 1959, plaintiff signed a Memorandum of Employee's Agreement, in which he agreed that:

> In consideration of my employment by Union Carbide Corporation . . . I agree . . . . [t]o assign to Union Carbide Corporation all inventions made by me, alone or jointly with others, in the course of such employment, relating to the business of the Corporation or resulting from tasks specifically assigned to me by the Corporation.

Cohen Aff., Exh. D. In 1986, plaintiff signed another Memorandum of Employee's Agreement with the same provision. Cohen Aff., Exh. E. Nevertheless plaintiff claims that "Carbide has been unjustly enriched by receiving the benefit of new product lines and inventions developed by plaintiff pursuant to its requests." Complt. at ¶ 141. Plaintiff contends that because his employment was terminated that the non-occurrence of the condition precedent that he be employed discharged his duty to assign under the terms of the employment agreement. However, plaintiff was employed by Carbide for 33 years, thus the condition precedent that he be employed by Carbide occurred and plaintiff is obliged to assign the rights to the inventions he made during the course of his employment to Carbide.

Plaintiff cites to *Eenkhoorn v. New York Tel. Co.*, 514 N.Y.S.2d 160 (1st Dept. 1987), claiming that Carbide is not entitled to summary judgment because issues of fact exist as to whether the company has been unjustly enriched. *Eenkhoorn* is distinguishable from this case because in *Eenkhoorn* there was no agreement between the employee and the employer pertaining to the development of ideas. Thus questions of fact existed as to whether the company had a policy of remunerating employees for suggestions and as to whether the company had been unjustly enriched by using the employee's ideas. *Id.* at 161. In this case there is an agreement between the employee and the employer as to the assignment of inventions, and plaintiff has presented no proof whatsoever that Carbide had a policy of paying employees for new inventions. Accordingly, Count V of plaintiff's amended

complaint is dismissed and defendants are granted summary judgment on plaintiff's unjust enrichment claim.

X. TORTIOUS INTERFERENCE WITH CONTRACT CLAIM

Defendant Shackelford seeks to dismiss plaintiff's claim against him for tortious interference with contract because the venue is improper and because it fails as a matter of law. Plaintiff contends that the venue is proper under Section 7(c)(1) of the ADEA (29 U.S.C. § 626(c)), and that the defendants have waived their venue objections under Fed. R. Civ. P. 12(h)(1).

28 U.S.C. 1391(b) provides in relevant part:

> A civil action . . . may be brought in (1) a judicial district where any defendant resides, if all defendants reside in the same State, (2) a judicial district in which a substantial part of the events or omissions giving rise to the claim occurred . . . or (3) a judicial district in which any defendant may be found, if there is no district in which the action may otherwise be brought.

Venue in this district is inappropriate under Section 1391(b)(1) because at the time the suit was commenced defendant Shackelford was a resident of Connecticut, defendant Lutz was a resident of the State of New York and Carbide (for the purposes of this motion) was both a resident of New York and Connecticut. Since a substantial portion of the acts or omissions giving rise to plaintiff's cause of action for tortious interference with contract occurred in Connecticut, plaintiff's place of employment, venue in Connecticut would be appropriate.

Plaintiff contends that venue is proper under Section 7(c)(1) of the ADEA, 29 U.S.C. § 626(c)(1) and under the New York Law Arm statute, New York Civil Practice Law and Rules § 302. Section 7(c)(1) of the ADEA provides that: "[a]ny person aggrieved may bring a civil action in any court of competent jurisdiction." However, this does not relieve the parties of establishing proper venue. *See Quinn v. Bomar Pub-*

lishing Co., 445 F. Supp. 780 (D. Md. 1978) (venue for ADEA claim lay in district in which plaintiff was discharged). Plaintiff states in a conclusory fashion that Shackelford is subject to personal jurisdiction under the New York long arm statute without attempting to show why the necessary elements for such jurisdiction have been met. Because no evidence has been presented that Shackelford transacts any business within the state of New York or that he derives substantial revenue from in interstate or international commerce, the New York long arm statute does not provide this Court with personal jurisdiction over Shackelford. N.Y. Civ. Prac. L. & R. § 302. Moreover, contrary to plaintiff's assertions, defendants have not waived their venue objections under Fed. R. Civ. P. 12(b) since in their Answer and in their motion papers the venue objection was properly asserted. Answer ¶ 166.

Plaintiff's tortious interference claim also fails as a matter of law. Under Connecticut law plaintiff's claim is barred by the Workers Compensation Act because plaintiff failed to allege that his employer, Carbide, directed Shackelford to commit the tort. *Vorvis v. Southern New England Tel. Co.*, 821 F. Supp. 851, 856 (D. Conn. 1993) ("intentional tort claim is barred unless the actor is acting with the knowing authorization of the employer") (citing *Jett v. Dunlap*, 425 A.2d 1263 (Conn. 1979)). Plaintiff's tortious interference with contract claims also fails under New York law because plaintiff may not circumvent the lack of a cause of action for abusive or wrongful discharge of an at-will-employee under New York law by casting his cause of action as another intentional tort. *Ingle v. Glamore Motor Sales, Inc.*, 538 N.Y.S.2d 771, 774 (1989) ("the plaintiff here cannot be allowed to evade the employment-at-will rule and relationship by recasting his cause of action in the garb of a tortious interference with his employment"); *Murphy v. American Home Products Corp.*, 461 N.Y.S.2d 232 (1983) (plaintiff not allowed to subvert the traditional at-will-contract rule by casting his cause of action as one for intentional infliction of emotional distress or as a prima facie tort). Accordingly, Count VII of plaintiff's

amended complaint against defendant Shackelford for tortious interference with contract is dismissed.

XI. PLAINTIFF'S DISCOVERY REQUESTS

Plaintiff's request for further discovery was denied in this Court's Order of November 22, 1993 and the order of December 6, 1993 pending the outcome of the motions decided herein. The request for further discovery is now denied because plaintiff failed to make a motion pursuant to Fed. R. Civ. P. 37 to compel production of the documents requested but not provided and because plaintiff has not provided the Court with evidence of any efforts by his counsel to obtain these documents from April 23, 1993 to the bringing of this motion for further discovery on September 8, 1993. Furthermore, defendants state that some of the requested documents are not relevant, have already been produced pursuant to earlier requests or cannot be produced because they do not exist. *Cf.* Order and Opinion of December 6, 1993. Plaintiff has failed to show how each of the document requests are relevant to his case and how the requested documents will produce any genuine issue of material fact as required by 56(f). *Burlington Coat Factory Warehouse Corp. v. Esprit de Corp* 769 F.2d 919, 926 (2d Cir. 1985). Accordingly, plaintiff's motion for discovery of documents listed as (a) through (b1) in his affidavit is denied without prejudice to plaintiff renewing the motion, within twenty days of the date of this opinion, after following the proper procedure to obtain such discovery.

XII. CONCLUSION

Summary judgment is granted in defendants' favor on all claims except for plaintiff's federal and New York State age discrimination claims. Count II, IV, V, VI, and VII of plaintiff's amended complaint are dismissed. Although plaintiff is entitled to a trial to determine whether Carbide discriminated against him on the basis of age, if he prevails his

damages will be limited as he cannot recover damages for lost wages.[12]

Plaintiff's motion for partial summary judgment for plaintiff on Counts I, II, III and V of his amended complaint is denied. Plaintiff's motion to strike the affidavit of Joel E. Cohen, Esq. sworn to July 9, 1993 and a letter dated December 3, 1992 from the record, for further discovery pursuant to Fed. R. Civ. P. 56(f) and sanctions against defendants pursuant to Fed. R. Civ. P. 11 is also denied. The parties shall bear their own costs. The parties will appear before the Court for a pre-trial conference on May 27, 1994 at 9 a.m. in Room 302.

IT IS SO ORDERED.

Dated: New York, New York
May 12, 1994

/s/ ROBERT P. PATTERSON, JR.
Robert P. Patterson, Jr.
U.S.D.J.

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[12] Compensatory and punitive damages are unavailable under ADEA. *Johnson v. Al Tech Specialties Steel Corp.*, 731 F.2d 143 (2d Cir. 1984).

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

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92 CIV. 6411 (HB)

RICHARD HALL LIGHTFOOT,

Plaintiff,

—against—

UNION CARBIDE CORPORATION, A.W. LUTZ, PRESIDENT, INDUSTRIAL CHEMICALS DIVISION and W.E. SHACKELFORD, VICE PRESIDENT, INDUSTRIAL CHEMICALS DIVISION,

Defendants.

AFFIDAVIT OF RICHARD H. LIGHTFOOT

STATE OF NEW YORK)
) ss.:
COUNTY OF NEW YORK)

RICHARD H. LIGHTFOOT, being duly sworn, deposes and says:

1. I am the plaintiff in the above-entitled action.

2. This affidavit is respectfully submitted in support of my motion pursuant to 28 U.S.C. §§ 144 and 455(b)(1), to disqualify Hon. Harold Baer, Jr., from conducting any further proceedings in the above-entitled litigation on the grounds that he has personal bias and prejudice against me and, in addition, has personal knowledge of disputed evidentiary facts, and on the further grounds that he should disqualify

himself as required under 28 U.S.C. § 455(a) because his impartiality might reasonably be questioned.

3. The affidavit is also submitted in support of my motion pursuant to Fed.R.Civ.P. 59(e) to alter or amend the Order and Opinion of Judge Baer dated October 24, 1995, and entered on October 26, 1995, by vacating it as a result of the foregoing circumstances, and also because it constitutes an infringement of my Constitutional and statutory jury trial rights.

4. The facts and reasons for my belief that bias or prejudice exists on the part of Judge Baer such as to require him to proceed no further in this litigation pursuant to 28 U.S.C. §§ 144 and 455 are set forth below:

(a) Shortly prior to the trial of the case, on June 21, 1995, Judge Baer met separately with me and my counsel for the purpose of attempting to compel me to agree to settle the case.

(b) At that conference, Judge Baer indicated distaste for the case and said in substance that it was a petty case that should be settled.

(c) It appeared to me that Judge Baer had also formed a dislike for the case because it had been reassigned to him from Judge Patterson just on the eve of when it was scheduled to be tried, causing a severe disruption to Judge Baer's schedule, as evidenced by the fact that the trial had to be conducted under severe time constraints in tandem with an important criminal case before him.

(d) In addition it appeared to me, based upon what he said, that Judge Baer felt upset by the fact that he had inherited a case with a litigation history and substantive rulings by Judge Patterson that Judge Baer felt obligated to apply in the trial of the case even though Judge Baer might not have so ruled himself and even though such rulings virtually

guaranteed that there would be a highly contested appeal, and perhaps the necessity for a new trial.

(e) However, Judge Baer failed to even follow Judge Patterson's rulings, as he stated that he was required to do, because it was Judge Baer himself who dismissed my Age Discrimination in Employment Act claim, not Judge Patterson, as Judge Baer admitted in his Opinion and Order dated October 24, 1995, at pp. 2-3, thus undercutting my claim for recovery of attorney's fees which are mandatory in ADEA cases under *Hagelthrone v. Kennecott Corporation*, 710 F.2d 76 (2d Cir. 1983).

(f) During the discussion, Judge Baer indicated a negative point of view regarding the merits of my claim for age discrimination and made statements about them that were highly derogatory.

(g) Judge Baer then put pressure on me to accept a settlement amount of $100,000 that he indicated that he had reason to believe that he thought the other side would accept.

(h) The settlement figure that Judge Baer attempted to compel me to accept would have entirely destroyed any economic benefit to me in having prosecuted this litigation, as the Judge very well knew.

(i) In response I told Judge Baer that I had a lot more invested than that in the case and that I couldn't possibly settle on those terms particularly since I was convinced that I had been repeatedly discriminated against by defendants on the basis of age.

(j) I also stated specifically to Judge Baer with what I had invested in the case in my time, effort, and expenses, I wanted a jury to hear my case and make its own determination.

(k) I felt quite strongly about this and repeated several times my desire for a jury determination as to my claims.

(l) Judge Baer responded in a hostile manner to me both verbally and in his demeanor.

(m) Moreover, Judge Baer indicated to me that he did not think that it was "reasonable" for me to want to go to the jury and that I should settle for the figure that he attempted to impose upon me.

(n) The figure that Judge Baer attempted to impose upon me was the outgrowth of his separate conversations in another room with defendants' representatives and counsel.

(o) In the course of such discussions, Judge Baer obviously was influenced to form an opinion as to the value of the case as a result of *ex parte* communications which was contrary to my interests and also contrary to what I had been advised by my own counsel.

(p) When I told Judge Baer that I desired to have the jury determine the matter Judge Baer reacted with hostility to me personally, and abruptly terminated the discussions.

(q) The ensuing events demonstrated his personal prejudice against me because on June 23, 1995, he unilaterally determined that I was not entitled to claim pretermination damages on statute of limitation grounds despite the fact that the three-year period under which such claims could be made had not expired at the time of my termination. (TR 6/21/95, p. 54) His action in doing so was in furtherance of his attempt to force me to settle for a small amount.

(r) Moreover, Judge Baer dismissed my claim under the Age Discrimination in Employment Act, even

though Judge Patterson specifically refrained from doing so, and attempted to cause prejudice by incorrectly stating that I had agreed that the "ADEA cause of action must be dismissed," (TR 6/23/95, pp. 2-3) an incorrect statement that my counsel had to point out to the Judge, to his displeasure, as is evidenced in his action then and thereafter (TR 3-4), the purpose of which was to further compromise and reduce my claim by eliminating the basis upon which I sought to recover attorney's fees, as shown in his decision of October 24, 1995, (a copy of which is annexed hereto as Exhibit A).

(s) Again, the evident purpose of Judge Baer was to cause prejudice to me by reducing the value of my lawsuit.

(t) In addition, because I had not agreed to the very strong pressure that he asserted on me to settle the lawsuit, his Order and Opinion of October 24, 1995, sets forth a damage figure of $75,000, only 10 percent of what the jury determined, and is also less than the amount that Judge Baer sought to compel me to settle for on June 21, 1995, namely, $100,000.

(u) Because I refused to settle for $100,000 it is apparent to me that Judge Baer's figure of $75,000 was intended to punish me for exercising my jury trial rights instead of clearing his docket by settling the case. Judge Baer intended to deprive me of the verdict which the jury returned and put a value of the case which was 25 percent less than what he himself indicated would have been in his view a viable settlement figure after I had gone through the further time, effort, expense and risk of proceeding to try the case over an extended period of time.

(v) Thus it is apparent that Judge Baer's Order and Opinion was not arrived at in good faith but an outgrowth of prejudice against me and should be vacated for that reason.

(w) The punitive purpose of the Order and Opinion dated October 24, 1995, is made clear by the fact that, at the time he issued that Order and Opinion, he already was aware, based upon my attorney's fees application, that the amount that I had invested in the case for attorney's fees was substantial, since nearly 3,000 hours of attorneys' time was involved.

(x) Judge Baer therefore knew, based upon what I had said at the conference on June 21, 1995 that, considering what I had invested in the case in attorney's fees, I would be a substantial loser, near the end of my resources, at his figure of $75,000, *after the trial*, even though the jury strongly had found me to be a victim of age discrimination as set forth in the special interrogatories submitted to the jury annexed hereto as Exhibit B (TR 6/29/95, p. 621). Thus the punitive intent of Judge Baer is obvious in the context of the discussions on June 21, 1995.

(y) The same circumstances that indicate prejudice against me on the part of Judge Baer also are indicative of bias of prejudice in favor of my adversaries in this case.

(z) The settlement figure that Judge Baer attempted to compel me to accept undoubtedly was the outgrowth of discussions that he had had with my adversary.

(aa) Moreover, the testimony presented in the trial of my case by Dr. Stanley L. Portnow, an eminent forensic psychiatrist, on the basis of which the jury returned its verdict, indicated severe health

impairment as a result of the stress and trauma to which I have been subjected by defendants.

(bb) The health impairment and trauma that Dr. Portnow testified to was much greater than that in a jury verdict in the New York Civil Court in *McCord v. National Benefit Life Insurance et al.*, (N.Y. Civ. Ct. 131501/91, 1994), under which the jury returned a verdict of $1.29 million (Exhibit C annexed hereto.)

(cc) I am informed that Mr. Cohen, counsel for defendants, was well aware of that decision because he knew that his former firm had represented the defendants in that case.

(dd) The testimony of Dr. Portnow and myself concerning stress and trauma that resulted in the impairment of my health also established that the decision of Judge Patterson in granting summary judgment to the defendants on the basis that I should have accepted an offer to return to employment at Union Carbide gave rise to a disputed issue of fact and never should have been decided on summary judgment. Thus my claim under the ADEA should not have at any time been dismissed, but should have been utilized on the basis of the same evidence going to the jury as to whether or not my nonacceptance of the purported offer in the letter of December 3, 1992 (Exhibit D annexed hereto) was reasonable in view of my medical and health complications.

(ee) Obviously, the jury in this case would have concluded that I had justification for not returning to the same situation that endangered my health and, in such circumstances, my claim for backpay and frontpay as permitted under the Age Discrimination in Employment Act was viable.

(ff) Further, the Order and Opinion of Judge Baer regarding remittitur is further evidence of bias and prejudice because the cases in which he refers to amounts received involve pain and suffering and did not involve health impairment and injury to business reputation, as in my case, both of which were elements that it had been conceded, even by defendants' counsel, were appropriate for the jury to consider. The evidence presented regarding the loss of my business reputation, based upon my own testimony itself came to $1,500,000 over the ten-year period of my remaining worklife expectancy. (TR 87, a copy of which is annexed hereto as Exhibit E.)

(gg) Finally, the bias and prejudice of Judge Baer is indicated by the fact that I am informed by counsel that Judge Patterson specifically agreed to review the question of pretermination damages based upon the situation that had been called to his attention in view of pleadings in my complaint making a claim for pretermination damages but that, even though Judge Baer had been made well aware that Judge Patterson did intend to review the claim for pretermination damages, as shown in my attorney's letters to Judge Baer of June 7, 1995, and June 9, 1995, annexed hereto as Exhibit F, Judge Baer insisted on treating the matter as having been previously finally disposed of by Judge Patterson, even though he well knew that Judge Patterson would have proceeded to consider the matter had the case not suddenly and arbitrarily been reassigned from Judge Patterson to Judge Baer virtually on the eve of when it was scheduled to go to trial.

5. During the meeting with Judge Baer on June 21, 1995, at which he attempted to compel me to settle at a figure that

would have produced a net loss to me, Judge Baer admitted that he had had one or more extended *ex parte* discussions with Judge Patterson concerning the case following its transfer from Judge Patterson.

6. From what Judge Baer said it was apparent that the hostile attitude of Judge Baer toward both the merits and the trial of my case was affected and influenced by the *ex parte* discussions with Judge Patterson.

7. Such *ex parte* discussions about my case are further grounds requiring disqualification pursuant to 28 U.S.C. § 455(b), and also create an appearance of impropriety pursuant to 28 U.S.C. § 455(a) because they affected the attitude of Judge Baer toward me and my case, and his dislike of having to try it under the circumstances involving its surprise assignment to him.

8. The grounds for disqualification described above have caused irreparable injury to me, violation of my right to Due Process of the Law guaranteed by the Fourteenth Amendment of the United States Constitution, and the abridgment of my jury trial and Due Process rights under Art. 1, §§ 1, 2, 6 and 8 of the New York Constitution.

10. Although the jury found that I had been injured as a result of unlawful age discrimination, the decision of Judge Baer reducing my damages to one-tenth of what the jury awarded has provided not a remedy for, but instead a very substantial aggravation of the injury suffered by me as a result of such illegal activities as the jury found the defendants to have committed.

WHEREFORE, Hon. Harold Baer, Jr., U.S.D.J., should be disqualified from conducting any further proceedings in the above entitled litigation and his Order and Opinion dated October 24, 1995, and entered October 26, 1995, should be vacated.

Respectfully submitted,

/s/ RICHARD HALL LIGHTFOOT
Richard Hall Lightfoot

Sworn to before me this
28th day of October, 1995

/s/ JOAN LIPIN
Notary Public

[LETTERHEAD OF UNION CARBIDE CORPORATION]

December 3, 1992

FEDERAL EXPRESS
RETURN RECEIPT REQUESTED

Mr. Richard H. Lightfoot
301 East 75th Street
New York, New York 10021

Dear Dick:

As you know, early this year we concluded that there was a need for a reduction in the number of employees in the Industrial Chemicals Division Ethylene Oxide Derivatives Marketing organization, and we decided to eliminate one of the three Market Manager positions. After evaluating the personnel involved, we told you on April 27 of our decision to eliminate your position. Because another position was not found for you internally, your employment was terminated as of June 30.

Recently Dave Roberts, one of the two Market Managers who were retained to do the remaining work, has resigned. By not replacing Dave Roberts, we are able to achieve, through voluntary attrition, the elimination of a Market Manager position.

As a result, we are able to offer you resumption of the Market Manager position that you held prior to its elimination earlier this year. Your return would be on the same terms and conditions as existed on April 27, without loss of Company Service.

This offer is unconditional.

Please complete the bottom portion of this letter and return it to me in the enclosed self-addressed, stamped envelope. If I do not receive a response by Monday, December 28, 1992, I will assume that you have rejected this offer.

Sincerely yours,

/s/ W. E. SHACKELFORD
W. E. Shackelford

INITIAL ONE:

_____ I accept the job offer as outlined above.
_____ I reject the job offer as outlined above.

ICD MARKETING
GROUP RATINGS
APRIL, 1992

Name	DOB	Abillity	Effect.	Versatility	Value	Uniq.	Reassign. Potential	Co. Service	SUM
Keel, A.T.	7/29/53	5	5	4	5	4	5	4	32
Rogers, E. C.	6/2/58	4	5	5	3	5	5	4	31
White, J.B.	3/27/42	4	4	4	5	5	3	5	30
Dillan, K.W.	9/24/54	4	4	3	4	5	4	4	28
Azsoth, G.	8/10/44	3	3	5	4	4	4	4	27
Barna, D.P.	10/10/47	4	4	4	3	3	3	4	25
Brymer, B.J.	1/11/46	3	3	2	3	3	3	5	22
Elling, G. F.	7/4/44	3	3	2	4	3	3	4	22
Hartjen, J. K.	6/28/49	4	3	2	4	3	3	4	23
Roberts, D.G.	7/8/59	3	3	2	3	3	4	3	21
Goebel, M.R.	8/20/52	3	2	3	3	3	2	4	20
Lightfoot, R.H.	6/22/35	3	3	2	3	3	1	5	20

Constitutional and Statutory Provisions Involved

United States Constitution, Seventh Amendment:

> "In suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved, and no fact tried by a jury, shall be otherwise reexamined in airy Court of the United States, than according to the rules of the common law."

Pertinent Portions of the Age Discrimination in Employment Act, 29 U.S.C. §§ 621 et seq.:

29 U.S.C. § 626(b):

> "The provisions of this chapter shall be enforced in accordance with the powers, remedies, and procedures provided in sections 211(b), 216 (except for subsection (a) thereof), and 217 of this title, and subsection (c) of this section. Any act prohibited under section 623 of this title shall be deemed to be a prohibited act under section 215 of this title. Amounts owing to a person as a result of a violation of this chapter shall be deemed to be unpaid minimum wages or unpaid overtime compensation for purposes of sections 216 and 217 of this title: *Provided*, That liquidated damages shall be payable only in cases of willful violations of this chapter. In any action brought to enforce this chapter, the court shall have jurisdiction to grant such legal or equitable relief as may be appropriate to effectuate the purposes of this chapter, including without limitation judgments compelling employment, reinstatement or promotion, or enforcing the liability for amounts deemed to be unpaid minimum wages or unpaid overtime compensation under this section. Before instituting any action under this section, the Equal Employment Opportunity Commission shall attempt to eliminate the discriminatory practice or practices alleged, and to effect voluntary compliance

with the requirements of this chapter through informal methods of conciliation, conference, and persuasion."

29 U.S.C. § 626(c)(1):

"Any person aggrieved may bring a civil action in any court of competent jurisdiction for such legal or equitable relief as will effectuate the purposes of this chapter: *Provided*, That the right of any person to bring such action shall terminate upon the commencement of an action by the Equal Employment Opportunity Commission to enforce the right of such employee under this chapter."

29 U.S.C. § 626(c)(2):

"In an action brought under paragraph (1), a person shall be entitled to a trial by jury of any issue of fact in any such action for recovery of amounts owing as a result of a violation of this chapter, regardless of whether equitable relief is sought by any party in such action."

29 U.S.C. § 626(d):

No civil action may be commenced by an individual under this section until 60 days after a charge alleging unlawful discrimination has been filed with the Equal Employment Opportunity Commission. Such a charge shall be filed—

(1) within 180 days after the alleged unlawful practice occurred; or

(2) in a case to which section 633(b) of this title applies, within 300 days after the alleged unlawful practice occurred, or within 30 days after receipt by the individual of notice of termination of proceedings under State law, whichever is earlier.

Upon receiving such a charge, the Commission shall promptly notify all persons named in such charge as prospective defendants in the action and shall promptly seek to eliminate any alleged unlawful practice by informal methods of conciliation, conference, and persuasion.

Fair Labor Standards Act, of 1938, as amended 29 U.S.C. §§ 215 et seq.

§ 216 Penalties

Any employer who violates the provisions of section 206 or section 207 of this title shall be liable to the employee or employees affected in the amount of their unpaid minimum wages, or their unpaid overtime compensation, as the case may be, and in an additional equal amount as liquidated damages. Any employer who violates the provisions of section 215(a)(3) of this title shall be liable for such legal or equitable relief as may be appropriate to effectuate the purposes of section 215(a)(3) of this title, including without limitation employment, reinstatement, promotion, and the payment of wages lost and an additional equal amount as liquidated damages. An action to recover the liability prescribed in either of the preceding sentences may be maintained against any employer (including a public agency) in any Federal or State court of competent jurisdiction by any one or more employees for and in behalf of himself or themselves and other employees similarly situated. No employee shall be a party plaintiff to any such action unless he gives his consent in writing to become such a party and such consent is filed in the court in which such action is brought. The court in such action shall, in addition to any judgment awarded to the plaintiff or plaintiffs, allow a reasonable attorney's fee to be paid by the defendant, and costs of the action. The right provided by this subsection to bring an action by or on behalf of any employee, and the right of any employee to become a party plaintiff to any such action, shall terminate upon the filing of a complaint by the Secretary of Labor in an action under sec-

tion 217 of this title in which (1) restraint is sought of any further delay in the payment of unpaid minimum wages, or the amount of unpaid overtime compensation, as the can may be, owing to such employee under section 206 or section 207 of this title by an employer liable therefor under the provisions of this subsection or (2) legal or equitable relief is sought as a result of alleged violations of section 215(a)(3) of this title.

§ 255 Statute of limitations

Any action commenced on or after May 14, 1947, to enforce any cause of action for unpaid minimum wages, unpaid overtime compensation, or liquidated damages, under the Fair Labor Standards Act of 1938, as amended [29 U.S.C.A. § 201 et seq.], the Walsh Healey Act [41 U.S.C.A. § 35 et seq.], or the Bacon-Davis Act [40 U.S.C.A. § 276a et seq.]—

(a) if the cause of action accrues on or after May 14, 1947—may be commenced within two years after the cause of action accrued, and every such action shall be forever barred unless commenced within two years after the cause of action accrued, except that a cause of action arising out of a willful violation may be commenced within three years after the cause of action accrued;

Judiciary and Judicial Procedure Act, 28 U.S.C. §§ 1 et seq.

§ 144 Bias or prejudice of judge

"Whenever a party to any proceeding in a district court makes and files a timely and sufficient affidavit that the judge before whom the matter is pending has a personal bias or prejudice either against him or in favor of any adverse party, such judge shall proceed no further

therein, but another judge shall be assigned to hear such proceeding."

§ 455 Disqualification of justice, judge or magistrate

(a) Any justice, judge, or magistrate of the United States shall disqualify himself in any proceeding in which his impartiality might reasonably be questioned.

(b) He shall also disqualify himself in the following circumstances:

(1) Where he has a personal bias or prejudice concerning a party, or personal knowledge of disputed evidentiary facts concerning the proceeding;

Civil Rights Act of 1964, Title VII, 42 U.S.C., §§ 2000e-5(g)

§ 2000e-5(g) Injuctions; appropriate affirmative action; equitable relilef; accrual of back pay; reduction of back pay; limitations on judicial orders

"If the court finds that the respondent has intentionally engaged in or is intentionally engaging in an unlawful employment practice charged in the complaint, the court may enjoin the respondent from engaging in such unlawful employment practice, and order such affirmative action as may be appropriate, which may include, but is not limited to, reinstatement or hiring of employees, with or without back pay (payable by the employer, employment agency, or labor organization, as the case may be, responsible for the unlawful employment practice), or any other equitable relief as the court deems appropriate. Back pay liability shall not accrue from a date more than two years prior to the filing of a charge with the Commission. Interim earnings or amounts earnable with reasonable diligence by the person or persons discriminated against shall operate to reduce the back pay otherwise allowable."